

(27,057)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 348.

ERIE RAILROAD COMPANY, PETITIONER,

vs.

WILLIAM M. COLLINS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT.

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Original.

United States Circuit Court of Appeals for the Second Circuit.

ERIE RAILROAD COMPANY, Plaintiff in Error (Defendant Below),

vs.

WILLIAM M. COLLINS, Defendant in Error (Plaintiff Below).

TRANSCRIPT OF RECORD.

Error to the District Court of the United States for the Western
District of New York.

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NEW YORK.

WILLIAM M. COLLINS,

Plaintiff,

against

ERIE RAILROAD COMPANY,

Defendant.

Civ. No. 1237.

SUMMONS.

2

To the above named defendant: -

YOU ARE HEREBY SUMMONED, to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

3

WITNESS, The Honorable John R. Hazel, Judge of the District Court of the United States of America, at the City of Buffalo, in the Western District of New York, and the seal of said court, this 12th day of December, in the year of our Lord, one thousand nine hundred and sixteen.

4

(Seal)

HARRIS S. WILLIAMS,

Deputy Clerk.

Hamilton Ward Esq.,

Plaintiff's Attorney,

Office and Post Office Address,

104-105 Erie County Bank Bldg.,

Buffalo, New York.

COMPLAINT.

5 IN THE UNITED STATES DISTRICT
 COURT.

FOR THE WESTERN DISTRICT OF NEW YORK.

WILLIAM M. COLLINS,

Plaintiff,

vs.

6 ERIE RAILROAD COMPANY,

Defendant.

The plaintiff complains of the defendant, by his attorney, Hamilton Ward, and for his cause of action alleges:

7 **FIRST:** That the defendant now is, and at all the times hereinafter mentioned was, a domestic railroad corporation, having its office and principal place of business in the City of New York, and engaged in the business of conducting a steam railroad in and through various places in the State of New York, and especially in the Town of Burns, County of Alleghany and State of New York, and that the defendant at all the
8 times hereinafter mentioned was engaged in interstate commerce over the said line of railroad.

SECOND: That heretofore, and on the 25th day of December, 1915, and for a considerable time prior thereto, the defendant operated a signaling tower and water tank in the Town of Burns, Alleghany County, N. Y., which said

Complaint.

tower was used for the purpose of operating 9
trains of the defendant, engaged in interstate
commerce, and which said tank was used for the
purpose of supplying the engines of said trains
with water; that the defendant then and there
maintained a gasoline engine for the purpose of
pumping water into the water tank for use
upon said trains, and required the tower men who
manned the said tower, used in the operation of 10
the said interstate trains as aforesaid, to operate
said engine for the purpose of pumping water in-
to the said tank.

THIRD: And the plaintiff further alleges that
heretofore, and on the 25th day of December,
1915, this plaintiff was employed as a towerman
at the said tower and was required by the defend- 11
ant to pump water, in the nighttime, into said
tank by means of said gasoline engine for the use
of interstate trains as aforesaid, and that the
plaintiff was then and there engaged in inter-
state commerce; that while the plaintiff was en-
gaged in starting the said gasoline engine, the
gasoline used for the purpose of starting the said
engine suddenly exploded and burned this plain-
tiff, causing him great and severe damage to be 12
hereafter set forth.

And plaintiff further alleges, on information
and belief, that the said gasoline engine was
insufficient and defective, and that the method
of operating and starting the same by the defend-
ant was dangerous; that this plaintiff had no
knowledge of gasoline engines or their method of

Complaint.

- 13 operation, and no particular knowledge of the
qualities of gasoline; that the said gasoline en-
gine was located in a small building and that
the only light provided by the defendant to light
the said building in the nighttime was a lantern;
that to start the said engine it was necessary to
draw gasoline in close proximity to said engine
and to then pour said gasoline in a considerable
14 amount into the said engine, that the only
receptacle furnished by the defendant for that
purpose was an open can; that it was necessary
to have light for the purpose of said operation,
and that it was the custom and practice of the
defendant prior to the 25th day of December,
1915, to start the said engine as aforesaid by the
drawing and pouring of gasoline in the open can,
as aforesaid, and to have in close proximity to
15 the engine a lighted lantern to enable said opera-
tion to be performed; that the defendant gave no
instruction or warning to this plaintiff concern-
ing the starting of said engine, or said operation,
other than as aforesaid; that the plaintiff was
permitted and instructed to start the said engine,
as aforesaid, and that this was the custom and
practice of the defendant; that permitting a
16 lighted lantern to come in such close proximity to
an open vessel containing gasoline, especially
when said gasoline is being poured, is, as this
plaintiff is now informed and verily believes, a
dangerous practice; that the said gasoline throws
off inflammable and explosive gases which may
come in contact with the said lighted lantern,
causing an exposure which communicates itself
to the gasoline in said can, of all of which the

Complaint.

plaintiff was ignorant at the time of the said accident; that by reason of the practice of the defendant, as aforesaid, and by reason of the defendant's furnishing an engine required to be started as aforesaid, and by reason of the defendant's failure to instruct and warn this plaintiff of the dangers of the said operation, and its failure to instruct him as to a proper method of operating and starting the said engine, if such a method existed, and its failure to furnish a proper light and can, and by reason of the said operation being conducted in a small, closed building, which should have been open, and by reason of the defects and insufficiencies in the appliances and equipment of the defendant in connection with the said engine and its operation, the said accident was caused, which was brought about without any fault or neglect on the part of the plaintiff, and was solely and wholly due to the negligence of the defendant, its officers and employees.

FOURTH: And the plaintiff further alleges that the said above set forth cause of action is within the jurisdiction of the United States District Court, in and for the Western District of the State of New York: that the same is brought under the provisions and for a violation of the Act of Congress commonly known as the Federal Employer's Liability Act.

FIFTH: That by reason of the matters before set forth this plaintiff has been seriously, painfully and permanently injured about the

Complaint.

21 head, body and limbs; that he has suffered, and will in the future suffer much pain; that he has been and will in the future be incapacitated from labor; that he has been obliged to expend considerable sums of money for medicines, nursing and medical attendance, and has been damaged in the sum of twenty-five thousand dollars (\$25,000.00).

22 WHEREFORE, plaintiff demands judgment against the defendant in the sum of twenty-five thousand dollars (\$25,000.00), besides the costs and disbursements of this action.

HAMILTON WARD,

Attorney for Plaintiff,

Office & P. O. Address,

104-105 Erie Co. Bank Bldg.,

23

Buffalo, N. Y.

(Endorsed) Civil 1237. U. S. District Court for the Western District of New York. William M. Collins, Plaintiff vs. Erie Railroad Company, Defendant. Summons and Complaint. Hamilton Ward, Attorney at Law, Rooms 104 and 105 Erie County Savings Bank Building, Buffalo, N. Y., Attorney for Plaintiff. Filed Dec. 12, 1916. S.

24 W. Petrie, Clerk.

State of New York,
County of Erie,
City of Buffalo.

}
ss.:
}

WILLIAM M. COLLINS, being duly sworn, deposes and says that he is the plaintiff in this ac-

Demurrer.

tion; that he has heard read the foregoing complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. 25

WILLIAM M. COLLINS.

Sworn to before me, this 7th 26
day of December, 1916.
Georgia Crowley,
Commissioner of Deeds in and for
the City of Buffalo, N. Y.

DEMURRER.

UNITED STATES DISTRICT COURT, 27

FOR THE WESTERN DISTRICT OF NEW YORK.

WILLIAM M. COLLINS,	}
<i>Plaintiff,</i>	
against	
ERIE RAILROAD COMPANY,	
<i>Defendant.</i>	}

28

The defendant, Erie Railroad Company, by its attorneys, Moot Sprague, Brownell & Marey, demurs to the complaint herein and for the grounds of its demurrer, states that it appears upon the face of the complaint:

Demurrer.

29 **FIRST:** That the court has not jurisdiction of
the subject of the action.

SECOND: That the complaint does not state
facts sufficient to constitute a cause of action.

MOOT, SPRAGUE, BROWNELL & MARCY,
Attorneys for Defendant,
Office & Postoffice Address,
30 302 Erie County Savings Bank Bldg.,
Buffalo, New York.

(Endorsed) Civil 1237. United States District
Court, Western District of New York. William
M. Collins, Plaintiff against Erie Railroad Com-
pany, Defendant. Demurrer. Moot, Sprague,
Brownell & Marcy, Office and P. O. Address, 302
31 Erie County Savings Bank Building, Buffalo, N.
Y. Filed Jan. 2, 1917. S. W. Petrie, Clerk.

OPINION.

DISTRICT COURT OF THE UNITED STATES. 33

WESTERN DISTRICT OF NEW YORK.

WILLIAMS M. COLLINS,	}
<i>Plaintiff,</i>	
against	
ERIE RAILROAD COMPANY.	
<i>Defendant.</i>	

34

On demurrer to complaint.

Hamilton Ward, for plaintiff.

Moot, Sprague, Brownell & Marey (John W. Ryan, of counsel) for defendant.

HAZEL, J.

35

As the demurrer admits facts well pleaded, i. e., that plaintiff was a towerman and as part of his duties was required to pump water by means of a gasoline engine into a water tank for use on locomotive engines engaged in interstate commerce, the fair presumption from the material allegation of jurisdiction is that the water to be pumped into the tank was for immediate use on locomotives operated in interstate commerce. It is of course not unlikely that different inferences may be drawn at the trial from what may be testified in relation to the use of the water which may be shown to have been intended for locomotives operating within the state.

36

In Hudson & Manhattan Ry. Co. v. Iorio, 239 Fed., 855, upon which reliance is placed by defend-

Opinion.

37 ant, the act of putting rails in storage for future
use at the time the plaintiff received injury was
held not to be so closely related to interstate com-
merce as to be a part of it, but in this case the
facts are claimed to be distinguishable in that
greater imminence existed between the water and
its use in interstate commerce, as obviously the
locomotive could not be operated unless supplied
38 with sufficient water for making steam. The facts
in *D. L. & W. v. Yurkonis*, 238 U. S., 439, and *C. B.
& Q. R. Co. v. Harrington*, 241 U. S., 177, are also
asserted to be different from those of this case. In
the *Harrington* case it was held that the coal mined
by the plaintiff, who was injured, was not so close-
ly related to interstate commerce as to be a part
thereof because of the uncertainty of its being
used for fuel by locomotives engaged in interstate
39 transportation, while in the *Yurkonis* case though
the plaintiff was engaged in mining coal which was
then taken in the coal cars from the switch tracks
to a coal trestle, which would ultimately be used
in interstate commerce, the Supreme Court held
that the mere fact that the coal was to be used in
interstate commerce after being mined and trans-
ported did not make the injury sustained by the
40 miner an injury sustained while engaged in inter-
state commerce.

Quite recently, in *Southern Railway Co. v. H. N. Puckett* (*Advance Sheets*) the Supreme Court decided that a car inspector who went to the assistance of another employe injured in a wreck while he was engaged in inspecting cars and was himself injured by stumbling over some large

Opinion.

clinkers in his path while carrying a jack for raising a derailed car was nevertheless engaged in interstate commerce as his act in raising the car was instrumental in opening the way for interstate transportation, even though his primary object was to render aid to a fellow workman. 41

It must be admitted that in view of the decisions herein mentioned, and the analysis of such decisions by Judge Scott in *Giovio v. N. Y. C. R. R. Co.*, 176 A. D., 230, the question is exceedingly close, and I am almost persuaded that this case falls within the principle of those cases, especially the *Harrington*, *Yorkonis* and *Iorio* cases, and that at the time of receiving the jury the plaintiff was not engaged in interstate commerce so as to give him the right to invoke the Federal Employer's Liability Act. I am however reluctant to hold, in view of the allegations of the complaint, that no cause of action is alleged of which this court may take cognizance as the inference may be drawn from such allegations that the water was being pumped into the tank for the immediate use of locomotives engaged in interstate commerce, and that such use was not dependent upon any remote possibilities. As said by Mr. Justice Holmes in *Minneapolis & St. Louis R. R. Co. v. Winters*, 242 U. S., 353, in speaking of an engine which appears to have been used interchangeably in interstate and intrastate commerce: 42 43 44

"Its next work, so far as appears, might be interstate, or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended upon its employment at

Order Overruling Demurrer.

45 the time not upon remote probabilities or upon accidental later events".

At this time, therefore, on this motion, I hold that the complaint fairly states a cause of action under the Federal Employer's Liability Act and that plaintiff was engaged in interstate commerce, or that his work was so closely connected therewith as to be a part of it. *Pederson v. D. L. & W. R. R. Co.*, 229 U. S., 146. The demurrer is over-
 46 ruled.

July 17th, 1917.

JOHN R. HAZEL,

D. J.

(Endorsed) Civil No. 1237. United States District Court, Western District of New York. William M. Collins, Plaintiff against Erie Railroad
 47 Company, Defendant. Opinion. Hazel, J. Filed July 18, 1917. S. W. Petrie, Clerk.

ORDER OVERRULING DEMURRER.
 UNITED STATES DISTRICT COURT,
 FOR THE WESTERN DISTRICT OF NEW YORK.

48	WILLIAM M. COLLINS,	}
	<i>Plaintiff.</i>	
	against	
	ERIE RAILROAD COMPANY,	}
	<i>Defendant.</i>	

The plaintiff in the above entitled action having commenced an action against the defendant in this

Order Overruling Demurrer.

court, by Hamilton Ward, his attorney, and the 49
 defendant having demurred to the complaint filed
 by the plaintiff herein, by Moot, Sprague,
 Brownell & Marey, its attorneys, and the issue
 thus raised having been duly brought on for a
 hearing before the Honorable John R. Hazel,
 judge of this court, on the 19th day of June, 1917.

NOW, after hearing John W. Ryan, of counsel 50
 for the defendant, in support of said demurrer,
 and W. J. Wetherbee, of counsel for the plaintiff,
 in opposition thereto, and due consideration hav-
 ing been had thereon,

IT IS ORDERED AND DECREED that said 51
 demurrer be, and the same hereby is overruled,
 with leave to the defendant, within twenty days, to
 withdraw said demurrer, and file and serve its
 duly verified answer to the plaintiff's complaint
 herein.

Dated, Aug. 6, 1917.

JOHN R. HAZEL,
United States District Judge.

(Endorsed) Civil 1237. United States District 52
 Court for the Western District of New York.
 William M. Collins, Plaintiff vs. Erie Railroad
 Company, Defendant. Order Overruling De-
 murrer. Hamilton Ward, Attorney at Law, Rooms
 104 and 105 Erie County Savings Bank Building,
 Buffalo, N. Y., Attorney for Plaintiff. Filed
 August 6th, 1917. S. W. Petrie, Clerk.

ANSWER.

53 UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF NEW YORK.

	WILLIAM M. COLLINS,	} No. CIV. 1257.
	<i>Plaintiff,</i>	
	vs.	
51	ERIE RAILROAD COMPANY,	}
	<i>Defendant.</i>	

The defendant above named by its attorneys, Moot, Sprague, Brownell & Marey, answers the complaint herein as follows:

55 FIRST: Admits that the defendant is a domestic railroad corporation engaged in the business of conducting a steam railroad in and through various places in the State of New York and especially in the Town of Burns, County of Allegany in said State.

56 SECOND: Denies that the defendant has any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in the complaint, except the allegations heretofore specifically admitted.

THIRD: As a first separate defense, the defendant alleges upon information and belief that the plaintiff, by entering and continuing in the employment of the defendant, assumed the risk of receiving personal injuries from dangers incidental to and inherent in that employment and

Answer.

that the injury alleged in the complaint arose from a danger incidental to and inherent in the defendant's business and that the plaintiff assumed the risk of receiving said injury alleged in the complaint. 57

FOURTH: As a further defense and in mitigation of damages the defendant alleges upon information and belief that the injury alleged in the complaint was caused by or contributed to by the negligence of the plaintiff herein. 58

WHEREFORE, the defendant demands judgment dismissing the complaint herein, together with the costs and disbursements of this action.

MOOT, SPRAGUE, BROWNELL & MARCY, 59
Attorney for Defendant.
 Office & Postoffice Address,
 302 Erie County Bank Bldg.,
 Buffalo, N. Y.

State of New York, }
 County of New York, } ss.:
 City of New York. } 60

DAVID BOSMAN, being duly sworn, deposes and says that he resides in the City of New York; that he is an officer, to wit: Secretary of the Erie Railroad Company; that he has read the foregoing complaint and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon

Answer.

- 61 information and belief, and as to those matters he believes it to be true.

DAVID BOSMAN.

Subscribed and sworn to before
me this 6th day of August, 1917.

Thomas Imrie,

Notary Public.

- 62 My County Clerk's No. is 32.
My Commission Expires
March 30, 1918.

- (Endorsed) Civil 1237. U. S. District Court,
Western District of New York. William M. Col-
lins, Plaintiff, vs. Erie R. R. Co., Defendant.
Answer. Moot, Sprague, Brownell & Marey, At-
63 302 Erie County Savings Bank Building, Buffalo,
N. Y. Filed Nov. 21, 1917. S. W. Petrie, Clerk.

CLERK'S MINUTES OF TRIAL.

At a Stated Term of the District Court of 65
 the United States for the Western Dis-
 trict of New York, held at the Federal
 Building in the City of Buffalo, N. Y.,
 on the 21st day of November, 1917.

Present: Hon. Edward S. Thomas,
U. S. Judge.

WILLIAM M. COLLINS,	}	<i>Civ. 1237.</i>
<i>Plaintiff,</i>		
against		
ERIE RAILROAD COMPANY,		
<i>Defendant.</i>		

66

Appearances:

For Plaintiff, Hamilton Ward.

For Defendant, John W. Ryan.

67

The plaintiff moves the trial of the case and the court orders a jury to be impaneled and that the trial do now proceed. Thereupon the following jury was drawn and sworn:

Matthew J. Hudson,

Bernard Strasser, Sr.,

C. Fred Schopp,

William E. Twichell,

John Laughlin,

Jacob J. Lang,

Jas. F. Loftus,

Joseph D. Dorland,

Charles Beebe,

Paul K. A. Wendt,

68

Clerk's Minutes of Trial.

69 George I. Peugeot,
George Proctor.

- Mr. Ward opens for the plaintiff.
Defendant's counsel waives opening to the jury.

Witnesses for the Plaintiff:

William M. Collins.
Recess until 2 p. m.
2 p. m.

70 Present as before.
Same appearances.
Trial resumed.

Plaintiff's Witnesses:

William M. Collins.
Fred S. Hoffman.
William F. Jeffreys.

71 Fred D. Jackson.
Plaintiff here rests.
Counsel for defendant here moves for a non-suit.

Motion denied and exception.

The court is here adjourned until 10 o'clock
a. m., November 22, 1917.

72 Thursday, November 22, 1917.
The court met pursuant to adjournment.
Present: Hon. Edwin S. Thomas, U. S. Judge.
Same appearances.
Trial resumed.

Defendant's Witnesses:

Leon L. Christ.
Defendant rests.

*Clerk's Minutes of Trial.**Plaintiff's Witnesses on Rebuttal:*

73

William M. Collins, re-called.

William F. Jefferies, re-called.

Both sides rest.

Counsel for defendant moves for a direction of
a verdict.

Motion denied.

Mr. Ryan sums up the case to the jury for the
defendant.

Mr. Ward sums up the case to the jury for the
plaintiff.

74

Recess taken until 1:30 o'clock p. m.

1:30 p. m.

Present as before.

Same appearances.

The court charges the jury.

The jury retires in charge of sworn officers at
2:30 p. m. to deliberate upon their verdict.

75

The jury comes into court at 4:15 p. m. and say
that they find a verdict in favor of the plaintiff and
against the defendant in the sum of \$15,000.00.

Attest.

S. W. PETRIE,
Clerk.

76

ORDER DENYING MOTION FOR NEW
TRIAL.

77

UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF NEW YORK.

WILLIAM M. COLLINS,

Plaintiff,

vs.

78 ERIE RAILROAD COMPANY,

Defendant.

79

The above entitled action having been tried in the United States District Court, for the Western District of New York, before the Hon. Edwin S. Thomas, justice, and a jury, and a verdict having been rendered in favor of the plaintiff and against the defendant, and a motion having been made for a new trial, and for a reduction of the verdict, on exceptions, and on the ground that the same was excessive, John W. Ryan, of counsel for defendant, appearing for said motion, and Hamilton Ward, attorney for the plaintiff, appearing in opposition thereto,

80

On motion of Hamilton Ward, attorney for the plaintiff, it is

ORDERED, that the motion for a new trial be, and the same is hereby denied.

EDWIN S. THOMAS,

U. S. D. J.

Attest

S. W. Petrie,

Clerk of the U. S. District Court,

for the Western District of New York.

Judgment.

(Endorsed) Civil 1237. U. S. District Court, 81
 Western District of New York. William M. Col-
 lins, Plaintiff, vs. Erie Railroad Company, De-
 fendant. Order. Hamilton Ward, Attorney at
 Law, Rooms 104-106-109 Erie County Savings
 Bank Building, Buffalo, N. Y., Attorney for Plain-
 tiff. Filed, March 8th, 1918. S. W. Petrie, Clerk.

82

JUDGMENT.

UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF NEW YORK.

WILLIAM M. COLLINS,	}
<i>Plaintiff,</i>	
vs.	
ERIE RAILROAD COMPANY,	
<i>Defendant.</i>	

83

This case having come on for trial, at a stated
 term of this court, before the Hon. Edwin S.
 Thomas, judge, and a jury, on the 21st day of No- 84
 vember, 1917, and said jury having rendered a
 verdict, on the 22nd day of November, 1917, in
 favor of the plaintiff and against the defendant,
 for the sum of Fifteen thousand dollars (\$15,000),
 and said verdict having been duly reported to the
 court, and entered in the minutes of the clerk
 thereof, it is hereby

Judgment.

85 ORDERED, ADJUDGED AND DECREED,
that the plaintiff above named recover of the above
named defendant, Erie Railroad Company, the
sum of Fifteen thousand dollars (\$15,000.00) so
found by said jury, together with the sum of
Forty-five and 66/100 dollars (\$45.66), costs and
disbursements, amounting in all to the sum of
Fifteen thousand, forty-five and 66/100 dollars
86 (\$15,045.66), and that plaintiff have execution
against said defendant to satisfy this judgment
and decree.

Judgment entered this 6th day of April, 1918.

S. W. PETRIE,
Clerk.

87 (Endorsed) Civil 1237. United States District
Court, Western District of New York. William M.
Collins, Plaintiff, vs. Erie Railroad Company, De-
fendant. Judgment. Hamilton Ward, Attorney at
Law, Rooms 104-106-109 Erie County Savings
Bank Building, Buffalo, N. Y., Attorney for Plain-
tiff. Filed, April 6th, 1918. S. W. Petrie, Clerk.

88

W. M. Collins, for Pltff., Direct

BILL OF EXCEPTIONS.

89

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF NEW YORK.

WILLIAM M. COLLINS,

Plaintiff,

vs.

ERIE RAILROAD COMPANY,

Defendant.

90

Trial had before the Hon. Edwin S. Thomas, Justice presiding, and a jury, at the City of Buffalo, N. Y., commencing November 21st, 1917, at 10:00 o'clock in the forenoon.

Appearances:

91

Mr. Hamilton Ward, for Plaintiff.

Messrs. Moot, Sprague, Brownell & Marey, by
Mr. John W. Ryan, for Defendant.

Examination of jurors.

Jury finally selected and sworn.

Plaintiff's counsel opens case to jury.

Defendant's counsel waives opening.

92

WILLIAM M. COLLINS, being duly sworn as a witness in his own behalf, testified as follows:

Direct Examination by Mr. Ward:

Q. Mr. Collins, you are the plaintiff in this suit?

A. Yes, sir.

W. M. Collins, for Pltf., Direct.

93 Q. How old are you?

A. 23 years old.

Q. Where were you born?

A. Cannaseraga, N. Y.

Q. What schooling did you get?

A. I was three years at high school at Cannaseraga.

Q. Through the grammar grade?

A. Yes, sir.

94 Q. Before this accident, were you a sound and well man?

A. Yes, sir.

Q. These scars on your hands and face did not exist before the accident?

A. No, sir.

Q. Your ears were all right before the accident?

95 A. Yes, sir.

Q. Your first job was where?

A. Working for the P. S. & W. at Cannaseraga, N. Y.

Q. How did you spend the time before you got the first job?

A. I was staying at home and going to school.

Q. What was your father's business?

A. Farmer.

96 Q. Did you have any gasoline engines on your father's place?

A. No, sir.

Q. Did you have any acquaintance with or experience in operating gasoline engines?

A. No, sir.

Q. Before this engine at the Erie tower?

W. M. Collins, for Pltf., Direct.

A. No, sir. 97

Q. Did you have any experience with gasoline, or the use of gasoline?

A. No, sir.

Q. Before you went to the Erie tower?

A. No, sir.

Q. Your first job was what?

A. Helper in the Pittsburg, Calumet & Northern depot at Cannaseraga. 98

Q. That was a vacation job,—during the time school was not in session?

A. Yes, sir.

Q. You were how old then?

A. 15 or 16 years old.

Q. Did you have any gasoline engine there at the depot?

A. Yes, sir.

Q. What? 99

A. Yes, sir.

Q. Did you have anything to do with its operation?

A. No, sir.

Q. What did you do at the depot there?

A. Started the fires in the morning, and sold a few tickets, and then went to school at 9:00 o'clock.

Q. What was your next job? 100

A. Working for the Erie.

Q. Where?

A. The first time I went to work for them was at Warsaw Village.

Q. How old were you then?

A. 17 years old.

Q. What was your job there?

A. I was night operator there and ticket seller.

W. M. Collins, for Pltf., Direct.

101 Q. Had you learned telegraphing by that time?

A. So that I could operate an instrument, that was all.

Q. At 17 years of age you took that position at Warsaw?

A. Yes, sir.

Q. What wages did you receive?

A. \$47.00 a month.

102 Q. Did you have, as any part of your duties at Warsaw, the operating of gasoline engines?

A. No, sir.

Q. How long had you worked for the Erie?

A. I worked for them from July 15th, 1912, until September 1st, 1913.

Q. Then what did you do?

A. Went back to the Pittsburg, Calumet & Northern.

103 Q. As what?

A. Telegraph operator.

Q. That was nearer home?

A. Yes, sir,—at Cannaseraga.

Q. Right at home?

A. Yes, sir.

Q. How long did you work as telegrapher for them at Cannaseraga?

104 A. From September 8th, to April 1st.

Q. Did you have anything to do with any gasoline engines during that time?

A. No, sir.

Q. What did you work at then?

A. I was laid off by the P. C. & N. on the 1st of April, and went back to the Erie, operating again.

Q. During the years that continued what did you do?

W. M. Collins, for Pltf., Direct.

A. I was extra man on the road—relief operator. 105

Q. You mean that you had to go wherever there was a shortage?

A. Yes, sir.

Q. Extra man on which road?

A. Erie road.

Q. During that time did you have anything to do with the operating of gasoline engines? 106

A. No, sir.

Q. What did you do then?

A. Worked for the Erie until the morning I got hurt.

Q. Had you worked in this tower, where the accident occurred before this occasion when you got hurt?

A. Yes, sir; I worked there in the spring of 1913. 107

Q. What did you do there then?

A. I was signal man, and levelman, and running this pump besides.

Q. How long did you work there at that time?

A. About ten days.

Q. Was that days or nights?

A. Days.

Q. Was that the first time you got acquainted with that pump, so as to run it? 108

A. Yes, sir.

Q. Who instructed you about running that pump at that time?

A. I picked it up—I remembered the principal parts of it from the time my brother worked there several years before that; occasionally I ran it, and from what I remembered I went there and got it started some way.

W. M. Collins, for Pltf., Direct.

109 Q. At the time you worked at this station the first time, were there three men there?

A. Yes, sir.

Q. Each man had a tour of duty of eight hours?

A. Yes, sir.

Q. Was there any one of those men superior to the others, or gave orders to the others?

Mr. Ryan: I object to that as calling for a conclusion of the witness.

110

The Court: Ask him who was in command there.

Mr. Ryan: I object to it as incompetent, immaterial and irrelevant, and calling for a conclusion of the witness.

The Court: Find out if he knows, first.

A. The first trick man was in charge.

The Court: Strike that out.

111 Q. Did you know at the time whether any particular man was in charge of the others?

A. Yes, sir.

Q. Which man was in charge?

Mr. Ryan: Objected to on the grounds previously stated.

The Court: Objection overruled.

Mr. Ryan: Exception.

112 Q. You may answer.

A. William Jeffries was in charge.

Q. What was he?

A. The first trick man.

Q. The first day you went to work at that tower,—will you tell us about when that was?

A. That was the 1st or 2nd of April, 1913.

Q. Did you operate this engine on the first day you went to work there?

W. M. Collins, for Pltf., Direct.

A. No, sir, I don't think I did. 113

Q. Did you operate it the second day?

A. I can't swear as to that; I can't swear just what time it was.

Q. But some time during those ten days you did operate it?

A. Yes, sir.

Q. State to his Honor and the jury what instructions you received from anybody connected with the railroad company as to the operation of that engine, before you operated it. 114

Mr. Ryan: I object to it as incompetent, immaterial and irrelevant if the source of information is not specified.

The Court: Has he testified, as yet, to the fact whether instructions were given him or not?

Mr. Ward: No, sir. 115

The Court: Objection sustained.

Q. Mr. Collins, before you operated this engine, did you receive any instructions from anybody connected with the Erie Railroad Company as to its operation?

A. No, sir, only from Robert Pinkney, the last time I worked there.

Q. I am speaking about the first time you worked there? 116

A. No, sir, I received no instructions.

Q. Did you receive any instructions, or warning, relative to the action of gasoline?

A. No, sir.

Q. Did you have any knowledge, at that time, about gasoline engines, apart from what you observed of the operation of this engine as operated

W. M. Collins, for Pltf., Direct.

117 by the other tower men?

A. No, sir.

Q. Were you acquainted with the explosive or other properties of gasoline?

A. No, sir, I was not.

118 Q. Mr. Ryan has very courteously given me some pictures here, that I would like to show you. Are these pictures, that I show you, pictures of that engine, and house? First, I show you a picture showing two buildings. What is that?

(Witness shown pictures).

A. Pump station and tower.

Q. As they were at the time you worked there?

A. No, sir; this door was closed up when I worked there the last time,—on the east side. (Shows).

119 Q. That end was closed up?

A. Yes, sir.

Q. Otherwise, it is the same?

A. Yes, sir.

Q. You indicated the window as the one on the end of the building?

A. Yes, sir.

Mr. Ryan: Which is the tower?

120 Q. Which is the tower, and which is the pumping station?

A. This one. (Shows).

Q. The one-story building?

A. Yes, sir.

Q. And the two-story building is the tower?

A. Yes, sir.

Mr. Ward: I offer the picture in evidence.

W. M. Collins, for Pltf., Direct.

Received in evidence, without objection, 121
and marked Plaintiff's Exhibit No. 1.

Q. Just mark an "X" there on the blind that
you say was closed at that time.

A. Here. (Shows).

The Court:

Q. That has been cut through since, or was it
closed up at that time, or what? 122

A. Closed up; I think the door has been open-
ed since.

Q. Was there an opening there at the time?

A. The window was there, and was closed up.

Mr. Ryan: The storm window was
closed.

Mr. Ward:

Q. Was it fastened or nailed up? 123

A. I think it was; yes, sir.

Q. I show you another picture; what is that?

(Witness shown another picture).

A. Some part of the engine.

Q. Does that appear to you to be a fair repre-
sentation of this engine as it was at that time, as
near as you can tell?

A. No, sir, I don't. 124

Q. You don't think that is a good picture?

A. No, sir; I don't think, when I was there, that
board was there. (Shows).

Q. Aside from the board, does the engine seem
to be about the same?

A. There was a pipe running here and here
into the ground, as I remember it. (Shows).

Q. Generally, does it show the engine?

W. M. Collins, for Pltf., Direct.

125 A. Yes, sir.

Mr. Ward: I offer it in evidence.

Photograph received in evidence, without objection, and marked Plaintiff's Exhibit No. 2.

Q. This board, which you say was not there at the time of the accident, is that the plank that appears in the foreground of the picture, running up and down?

126

A. Yes, sir.

Q. How many times do you think you started that engine the first time you were there?

The Court: The first time he was in the employ of the Erie?

Q. The first time you were in the employ of the Erie; how many times the first ten days?

A. I think five or six times.

127

Q. How did you start it?

A. When you first go into the engine you take a small tin can, that is provided there—an old tin can—and go to the end of the engine at the cylinder, where there is a small spigot, and hang that can over the end of the spigot, and turn a little faucet so that the gasoline will run out; then you go around to the side of the engine, where there is a small hand pump—so small that you can hold it with your thumb and first finger—and pump gasoline—pump about a minute until the gasoline starts flowing in the tin can at the end of the cylinder.

128

Q. What did the pump do? Pump air into the cylinder, or gasoline into the cylinder, or don't you know?

W. M. Collins, for Ptf., Direct.

A. I don't know, but I think it pumped gasoline into the cylinder. 129

Q. Do you know where the gasoline came from that you pumped into the cylinder?

A. I couldn't say, but I think from the tank outside of the building, farther away.

Q. After you pumped a while, you say the gasoline flowed out of the cylinder?

A. After I pumped a while the gasoline flowed out of the cylinder into the little can in a little thin stream, and I understood—I was instructed that this can was to be nearly full of gasoline— 130

Q. Who instructed you?

A. Robert Pinkney.

Mr. Ryan: I move to strike that out.

The Court: Strike it out.

Q. Did Mr. Pinkney instruct you the first time? 131

A. No, sir.

Q. Did you do it that way the first time?

A. Yes, sir.

Q. Had you seen others do it there before?

A. Only the times I saw my brother do it.

Q. You saw your brother doing it?

A. Yes, sir.

Q. He worked there at the time you were a boy? 132

A. Yes, sir.

Q. How large was that can?

A. It was a small can, about three or four inches high, and I should judge two inches in diameter.

Q. What kind of can was that?

A. An ordinary old can—I think a can that pork and beans came in—an old can they picked up somewhere.

W. M. Collins, for Pltf., Direct.

133 Q. Top open?

A. Yes, sir.

Q. You pumped gasoline into that until how much was in it?

A. Until it was nearly full.

Q. What did you do then?

134 A. Go to the side of the engine—on the cylinder there is a small screw, and you unscrew that from the top of the cylinder, and take half of the gasoline in the can—

Q. After you got the cap off the top of the cylinder, what did that uncover?

A. A hole about $\frac{3}{4}$ -inch across—in diameter.

Q. What did you do then?

A. Took the can and poured the gasoline in—about one-half of this can full,—into the cylinder hole.

135 Q. Did you have a funnel there?

136 A. No, sir. What you have left in the can you take and pour into the air pump alongside of the big fly wheel, and after you have done that, you take the screw that you took out of the top of the cylinder, and you must have a red-headed match, and you cut the top off the match and place it in the end of this screw; there is a small hole in the end of the screw that you take out of the top of the cylinder, and you place the match in the little slot and screw it back again, and turn on the electric current on the wall—on the board, and go to the large hand pump there alongside of the engine and start pumping air into the cylinder, until your large fly-wheel starts moving—until there is a pressure there; when you think you have enough air there,—or whatever it is,—to throw the big

W. M. Collins, for Pltf., Direct.

wheel over, you reach over and hit the screw that 137
you placed the match into a crack, and then, if you
have everything all right, your wheel turns over.
You may have to try it three or four times before
it will start it.

Q. Is it necessary to pour in gasoline each
time?

A. I think it is; yes, sir.

Q. You did that, you think, about five times, 138
the first time you worked there?

A. Yes, sir.

Q. Always in the daytime?

A. Yes, sir.

Q. You did not use any lantern?

A. No, sir, it wasn't necessary.

Q. During the interval between the time you
first worked there and the second time you came
to work there, had you had any further experi- 139
ence with that or any other gasoline engine?

A. No, sir, I did not.

Q. You went to work there the second time
about when?

A. 21st of December.

Q. What year?

A. 1915.

Q. What was your work then? 140

A. The tower had been changed about there—
there was an interlocking system they had there
that was taken out; a great many trains took the
siding, and it was necessary to go up and down the
track, when a train wanted to take the siding, and
line the switches up for them; besides that we were
required to run the gasoline engine.

Q. What were your duties there when you went

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141 to work there on the 21st of December,—the second time,—what were you supposed to do? Tell us the whole thing.

A. Report the trains as they went back and forth by the tower to the dispatcher in Buffalo; in case a train wanted to go on the siding, the dispatcher would notify you to put the train on the siding, and it was necessary to walk down the track four or five rods and throw the switch, and
142 walk up the track about the same distance and throw another switch to put these trains in there; the same way going east or west.

Q. How many men were there on duty there at a time?

A. One man only.

Q. Alone?

A. Yes, sir.

143 Q. Your ordinary place was where in reference to the tower shown on that picture, Exhibit No. 1? (Shows).

A. I don't get that.

Q. Where was your ordinary place of work in reference to the tower shown in that picture?

A. In the tower.

Q. Second story or first story?

144 A. Second story.

Q. Did you have telegraph instruments up there?

A. Yes, sir, but very seldom used them.

Q. How did you report the trains?

A. By telephone.

Q. The tower was equipped with telephones?

A. Yes, sir.

Q. The Erie railroad at that point is a double track railroad?

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A. Yes, sir. 145

Q. Do you understand where the Erie railroad runs to?

A. It runs to New York and Buffalo, I know.

Q. A short distance west of this Cannaseraga tower does the line branch off that goes through Jamestown and west to Ohio, etc.?

A. Yes, sir, it goes to Salamanca and farther that way.

Q. At what point does the road branch, one branch coming to Buffalo, and the other branch going west? 146

A. At Hunts.

Q. How far is that from Cannaseraga?

A. About 10 or 11 miles.

Q. Do freight trains running from New York, Cleveland and Chicago pass through Cannaseraga? 147

A. They have cars in there for all those points.

Q. About how many trains a day passed your tower when you worked there the last time—freight trains?

A. In the night time the traffic was very light there; sometimes there would be—

Q. Just answer the question. I asked you about how many trains a day passed that tower—in 24 hours—day and night? 148

A. I should think between 25 and 30 a day, each way.

Q. Each way?

A. Yes, sir.

Q. You are limiting that to freight trains?

A. Yes, sir.

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- 149 Q. In addition to the freight trains, I suppose there were also a number of passenger trains?
- A. Yes, sir.
- Q. Which operated over the same tracks?
- A. Yes, sir.
- Q. East of you where was the next water tank?
- A. Hornell, N. Y.
- Q. How far?
- 150 A. 12 miles.
- Q. West of you where was the next water tank?
- A. Hunts, N. Y.
- Q. That, you say, was 10 miles?
- A. Yes, sir.
- Q. About how many trains a day took water at that tower, on an average?
- A. About 25 trains took water there.
- Q. About 25 trains a day?
- 151 A. Yes, sir.
- Q. Freights?
- A. Yes, sir.
- Q. So that, if I understand it correctly, about one-half of the trains that passed that tower stopped to take water?
- A. Yes, sir.
- Q. How much water did the tank hold?
- 152 A. About 250 barrels—50 barrels, I should say.
- Q. How much did you say?
- A. 50, or 250 barrels of water.
- Q. 50?
- A. 250.
- Q. 250 barrels?
- A. Yes, sir.
- Q. About how much would an engine take, as a rule, when it drew water from that tank?

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- A. Usually took about 2½ feet out of the tank. 153
- Q. One engine?
- A. Yes.
- Q. How high was that tank?
- A. 16 feet.
- Q. So that seven or eight engines would exhaust the tank?
- A. Yes, sir.
- Q. Would you have any telegraphic information in advance of engines intending to stop at that tank to take water? 154
- A. No, sir.
- Q. When an engine did stop at the tank to take water, did you have any duty in connection with reporting its stopping there?
- A. Yes, sir; you are supposed to keep a record on your train sheet.
- Q. Did you have anything to do about operating the tank when an engine took water? I don't mean the pumping, but doing anything about the tank? 155
- A. No, sir.
- Q. That was done by the train crew?
- A. Yes, sir.
- Q. Was your permission required before an engine would stop to take water? 156
- A. No, sir.
- Q. These 25 engines which stopped to take water daily, as you estimate it, were those engines which were drawing trains that passed through there—freight trains?
- A. Yes, sir.
- Q. Was there some gauge or indication on that

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157 tank which showed you and the other men when the water was getting low?

A. Yes, sir.

Q. What was that?

A. A small piece of iron pipe or rod connected with a plank floating inside of the tank; when the tank was full of water it would be up high, and the weight down at the bottom of the tank.

158 Q. Where did the water come from?

A. From a well.

Q. On the railroad property?

A. I couldn't say whether it was on the railroad property or not.

Q. Close by?

A. Yes, sir.

Q. Do you know how long that engine and tank house and tank stood there, Mr. Collins?

159 A. It stood there a long time—before I was born, I guess.

Q. Do you know how long that particular engine had been there?

A. No, I don't.

Q. How long back can you remember it there?

A. I can remember it being there 17 or 18 years ago.

160 Q. You remember it being there from the time you were a little boy?

A. Yes, sir.

Q. Did engines of trains passing in both directions take water there?

A. Yes, sir.

Q. Engines of trains going west as well as those going to or coming from Buffalo?

A. Yes, sir.

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Q. Over which branch was the largest volume of freight traffic—the Buffalo branch, or the branch that went to the west? 161

A. The branch that went to the west.

Q. When you went to work there on the 21st of December,—before the accident,—did you receive any instructions from anybody connected with the railroad company as to your duties in connections with this tank?

A. Only that I was to keep it filled in case it got low. 162

Q. Who told you that?

A. Robert Pinkney.

Q. Who was he?

A. The man that I relieved at 11:00 o'clock at night.

Q. A man occupying a similar position to yours? 163

A. Yes, sir.

Q. Did anybody, at the time of that employment, give you any further instructions or information regarding the use of this engine?

A. No, sir.

Q. Or the properties of gasoline?

A. No, sir.

Q. Did anybody else, at that time, have anything to do with the operation of this engine, except the three towermen? 164

A. No, sir.

Q. What was the first thing you did with that engine after you came to work on the 21st of December?

A. The first night?

Q. Yes?

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- 165 A. The first night I came in I said to the man I relieved that I had forgotten how to run that engine, and I asked him to go and show me how.
- Q. Did the tank require filling at that time?
- A. No, sir.
- Q. It was full?
- A. Yes, sir.
- Q. Tell us what occurred when he went to show you how?
- 166 A. I went down—
Mr. Ryan: Who was it?
- A. Pinkney. I held the lantern for him.
- Q. What kind of lantern did you take with you?
- A. An ordinary Erie railroad lantern.
- Q. A kerosene lantern?
- A. Yes, sir.
- Q. With a flame?
- 167 A. Yes, sir.
- Q. Covered by a globe?
- A. Yes, sir.
- Q. Resting on a brass disc? With a perforated brass disc?
- A. I don't think it was brass.
- Q. Metal?
- A. Yes, sir.
- Q. Perforated?
- 168 A. Yes, sir.
- Q. Who furnished the lanterns? The men themselves, or the railroad company?
- A. The railroad company.
- Q. Were there any other lanterns there except these ordinary railroad lanterns?
- A. No, sir.

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Q. So that you and Mr. Pinkney went from the tower to the shanty? 169

A. Yes, sir.

Q. About what time of night was that?

A. About 11:15.

Q. Tell us what occurred?

A. I went in, and he went through the same performance that I went through that same night, while I held the lantern for him.

Q. How close did you hold the lantern to the place where you were pouring the gasoline in the hole? 170

A. I stood away from the engine, and held it up, so that he could see.

Q. How high did you hold it?

A. About arm's length—about like that (shows).

Q. Even with your shoulder? 171

A. Yes, sir.

Q. You held it up there during the whole performance?

A. I walked around the engine when he was doing it.

Q. Did you continue holding the lantern up?

A. Yes.

Q. Did he say anything to you then about the danger of having the lantern low down to the floor? 172

A. No, he didn't.

Q. Did you know at that time, or at any time before you got burned, that gasoline fumes seek the lower levels?

A. No, sir.

Q. Did Mr. Pinkney, on that occasion, use that tin can that you referred to?

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173 A. Yes, sir.

Q. Was that the same can that had been used the year before?

A. I couldn't say that; I don't hardly think so.

Q. Was that similar?

A. Something like the other; I don't remember what can it was.

174 Q. Would your description of the can used two years before apply, in a general way, to this one?

A. Yes, sir.

Q. About the same kind of can?

A. Yes, sir.

Q. Was there any funnel there at that time?

A. No, sir.

Q. Just the can? Did that have any handle?

A. There was a wire there for a handle, so that we could hang it over the end of the spigot.

175 Q. Didn't it have a spout?

A. No, sir, only a very small dent in the side of the can—pinched together in some way.

Q. Did you notice the way Mr. Pinkney poured the gasoline in this opening or hole?

A. No, sir, I didn't pay particular attention to that.

176 Q. Did you observe whether or not any of the gasoline was spilled, or whether he was able to direct all that came out of the can into the hole?

A. I couldn't say as to that; I didn't notice sharp enough for that.

Q. Did Mr. Pinkney go through the same performance that you described?

A. Yes, sir, he did.

Q. Did he say anything further to you?

A. No, sir.

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Q. That was what day? 177

A. The night of December 21st.

Q. Did you have occasion to again operate that engine before the accident?

A. No, sir, I did not.

Q. Did I understand you that traffic is lighter there at night?

A. Yes, sir; after midnight it gets lighter.

Q. They don't use so much water? 178

A. No, sir.

Q. So that the tank hadn't emptied itself prior to the 25th of December?

A. No, sir.

Q. Did I understand that you gave notice of the approach of all trains that passed by that tower?

A. If the dispatcher asks it, I reported the trains when in sight, if it is necessary; otherwise you let them go by. 179

Q. Did you make a record of the trains that passed you?

A. Yes, sir.

Q. When there were orders to deliver to these trains, you received those orders and delivered them?

A. Yes, sir. 180

Q. Did you handle the apparatus there which stops the trains, and indicates the position of the switches?

A. Yes, sir.

Q. Block signals?

A. Electric block system.

Q. So that you were advised about the condition of the traffic either side of them?

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181 A. Yes, sir.

Q. And gave such indications as required for the safe operation of the railroad at that point?

A. Yes, sir.

Q. Was that what occupied your time during your hours of duty on the 21st of December and down to the time of the accident?

A. Yes, sir.

182 Q. On that night what was the occasion for your going to the engine?

A. There happened to be a wreck on the road at Hunts, and I had two trains on the siding there; it was impossible to get by the derailment, and they were standing around to water—

Mr. Ryan: I move to strike out that it was impossible to get by.

The Court: Strike it out.

183 Q. They were standing there on account of a derailment?

A. Yes, sir.

Q. What kind of trains were they?

A. Going west to Salamanca.

Q. Freight or passenger?

A. Freight.

Q. Loaded trains?

184 A. I can't say; I don't know what they consisted of.

Q. Taking water there?

A. Yes, sir.

Q. Did a time come, during the course of the evening, when you noticed the height of the water in the tank?

A. There was no indication on this end so you could tell at night: the only way you could judge

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was by the number of engines that stopped and took water. 185

Q. Had there been a considerable number that night?

A. Yes, sir.

Q. So that you went over there to pump water?

A. Yes, sir.

Q. About what time?

A. 3:15.

Q. You took your lantern with you? 186

A. Yes, sir.

Q. Tell us what happened?

The Court:

Q. 3:15 in the morning?

A. Yes, sir, 3:15 in the morning.

Mr. Ward:

Q. What happened? 187

A. I walked in the pump station and proceeded to get gasoline out of the end of the cylinder.

Q. Did you do that as you saw Mr. Pinkney do it on the 21st?

A. Yes, sir.

Q. You found the can there?

A. Yes, sir.

Q. Used the one that was there? 188

A. Yes, sir. I started pouring the gasoline in the cylinder and it exploded—the gasoline exploded—

Q. Wait a minute; you are going too fast. Did you first draw gasoline out of the cylinder?

A. Yes, sir.

Q. And operated the little pump you spoke of?

A. Yes, sir.

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189 Q. That forced the gasoline out of the cylinder?

A. Yes, sir.

Q. Did you fill this can?

A. Yes, sir.

Q. What gave you light while you were doing that?

A. The lantern I put in there.

Q. Where did you put the lantern?

190 A. On the pipe on the side of the engine.

Q. How close to the floor?

A. About a foot away from the floor.

Q. About a foot away from the floor?

A. Yes, sir.

Q. How close to the place where you were pouring the gasoline?

A. About three feet.

191 Q. Then after you drew the gasoline, did you unscrew that little cap?

A. Yes.

Q. Did you start pouring the gasoline into the little hole?

A. Yes.

Q. How long did you pour it before anything happened?

192 A. When I was pouring there probably about a second or two.

Q. Had any of the gasoline—do you know whether it all went in the hole or whether some of it missed the hole?

A. I think probably some of it missed the hole.

Q. Were you pouring it as carefully as you could?

A. Yes, sir.

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Q. What happened then?

193

A. The first thing I knew I saw the flame in my lantern nearly go out; I looked over to see what the trouble was with it, and just as I looked over the explosion went off.

Q. Then what?

A. I was covered with fire—my hands and face—and I made a dive for the door to get out, but the door was locked on me—it was a snap lock; I ran back into the room—I didn't know what I was going to do—

194

Q. Were you still burning?

A. Yes, sir. I ran back into the room, and I didn't know what to do then; I tried the door again, and found it locked, and I couldn't get out. I saw there was a window right alongside of the door, with a pane of glass in it,—a small pane of glass,—and I shoved my hand through the window and stuck my head out, and hallooed as loud as I could; a conductor happened to be in the tower—

195

Q. A conductor of one of the trains?

A. Yes, sir. He came over there and tried the door, and couldn't get in; he laid down his lantern and kicked the window in, and pulled me out.

Q. Had the flames gone out by that time?

A. Yes, sir. I pulled my coat up over my head; my clothes were burning though.

196

Q. This building where this occurred was about how big?

A. I think about 10 ft. x 18 ft.

Q. 10 x 18?

A. Yes, sir.

Q. One story?

A. Yes, sir.

W. M. Collins, for Pltf., Direct.

197 Q. At that time what openings or entrances were there provided in it?

A. The only entrance was the door; this place was closed up about a year before that—the company nailed all the windows up—boarded them up; this window where I got out of,—one of the men about two days before that tore the boards off from it; he most probably thought there might be an accident some time.

198 Mr. Ryan: I move to strike out what the man thought.

The Court: Strike it out.

Q. One of the men broke it apart?

A. Yes, sir.

Q. What caused the door to lock?

A. The way I thought, the concussion after the explosion.

199 Q. Did it have a spring lock on it?

A. A snap lock.

Q. When you went in did you leave the door open or closed?

A. Open, about six inches.

Q. Was there a stove in this building?

A. Yes, sir.

Q. Fed by a coal fire?

A. Yes, sir.

200 Q. Was that burning at that time?

A. Yes, sir, 'as I remember it, it was.

Q. Was it a part of your duty to keep that going?

A. I never paid much attention to it, but we are supposed to keep a fire in there.

Q. How far away was that from this place where you had poured the gasoline in the cylinder?

W. M. Collins, for Pltf., Direct.

A. About six feet.

201

Q. And your lantern was about three feet away?

A. Yes, sir; the lantern was directly across from it.

Q. Any other light there except the lantern?

A. No, sir.

Q. After they pulled you out, what did they do with you?

202

A. They took me up in the tower.

Q. Then what?

A. The conductor got hold of the dispatcher on the telephone, and told him the condition I was in; the dispatcher wanted to talk with me on the telephone, and the conductor said I wasn't able to talk with anybody—

Mr. Ryan: I object to any conversation, and move to strike it out.

203

The Court: Strike it out.

Q. You cannot tell what was said; what was done with you?

A. They got orders to run me back to Cannaseraga with an engine and caboose; they took me out of the tower, and there was a string of cars in one of the trains across in front of the tower, and I was compelled to crawl through the cars to get to the caboose.

204

Q. Where were you taken?

A. Cannaseraga.

Q. What were you doing there?

A. I was walking about town ten minutes before I got a doctor,—in the cold air—and they took me in Dr. Bacon's office there.

W. M. Collins, for Pltf., Direct.

205 Q. What did he do for you?

A. Washed my hands and face and rubbed something on them, and bandaged my face and hands, and said to call in the next day.

Q. What did they do with you then?

A. Took me to the hospital at Hornell.

Q. How long were you there?

A. 13 weeks.

206 Q. Did you suffer during that time?

A. Yes, sir.

Q. Who took care of you at the hospital at Hornell?

A. Dr. J. D. Kelley and Dr. Raymond Kelley, —father and son.

Q. Did Phillips have anything to do with you?

207 A. Not that I know of; all the doctors were watching me,—I was burned so badly—they were just watching me; there was another doctor there —I don't remember his name.

Q. Did you receive a bill from the hospital?

A. No, sir.

Q. Or from the doctors that took care of you?

A. No, sir.

Q. After the 13 weeks in the hospital, where did you go?

208 A. I went and spent one week with my brother-in-law in Hornell.

Q. Then where did you go?

A. I went home then.

Q. Will you step down here in front of the jury and show them your injuries.

(Witness exhibits himself to the jury).

Q. Was your right ear formerly a normal ear?

A. Yes, sir.

W. M. Collins, for Pltf., Direct.

Q. How about your left ear?

209

A. That was normal.

Q. Did you have any holes under your ears?

A. No, sir.

Q. Were you burned below the line of your collar?

A. No, sir.

Q. The burns are all above, where they can be seen?

210

A. Yes, sir.

Q. Were your hands burned?

A. Yes, sir.

Q. Did you have any covering on your hands?

A. No.

Q. Have the burns on your hands interfered any with the movement of your fingers and thumb?

A. Yes, sir, the thumb is stiff.

Q. On which hand?

211

A. Right hand. (Shows).

Q. How much movement is there? You are exhibiting to the jury all the movement with that thumb, are you?

A. Yes, sir.

Q. Was that thumb crooked before the accident?

A. No, sir.

212

Q. Did you have a normal hand?

A. Yes, sir.

Q. Are you a right-handed man?

A. Yes, sir. I was cut there. (Shows).

Q. The scar on the wrist of your right hand was due to cutting it with the glass when you tried to escape?

A. Yes, sir.

W. M. Collins, for Pltf., Direct.

213 Q. Was there any knob or any catch on the inside of the door?

A. There was no knob on the door inside.

Q. Was that the reason you couldn't open it?

A. It was locked with a snap lock.

The Court:

214 Q. You couldn't open the snap lock from the inside?

A. I could, but my hands were burning; I couldn't find it—I was burning and I couldn't get it.

Mr. Ward:

Q. Did your lantern go out?

A. Yes, sir.

215 Q. What have you done since you got these burns?

A. I was home all summer, after I got out of the hospital; I went to work on the state road for T. H. Gill, of Binghamton, as time-keeper, the first of October.

Q. Ten months after the accident?

A. Yes, sir.

216 The Court:

Q. October, a year ago?

A. Yes, sir. I was laid off there the 1st of December; it will be a year the first day of December.

Mr. Ward:

Q. What pay did you receive there?

A. \$1.66 a day.

W. M. Collins, for Pltf., Direct.

Q. You were time-keeper? 217

A. Yes, sir.

Q. When did your face and hands heal up?

A. It was a long time after I got out of the hospital before they healed up.

Q. Had they healed up when you went to work for the good roads contractor?

A. It was so that they didn't bother me very much at that time.

Q. You worked two months? 218

A. Yes, sir.

Q. What were your wages at the time you were hurt?

A. \$60.00 a month.

Q. Had you become a competent telegraph operator—were you a telegraph operator?

A. Yes, sir.

Q. Able to take and receive ordinary messages going over the railroad wires? 219

A. Yes, sir.

Q. After December, when your work with the good roads contractor was finished, what did you do?

A. I was around home all winter until the 1st of May.

Q. What was your condition during the winter,—a year after the accident,—when you were about home? 220

A. I had to stay close to the house; it was almost impossible to stand cold on my face—cold or frosty air.

Q. What effect did the cold weather have on your face?

A. Chapped it, and made it sore and numb.

W. M. Collins, for Plff., Direct.

- 221 Q. Did you have any trouble with your hands?
 A. Not much, only they used to get cold easily
 —or the thumb did.
 Q. Did you do light work about the farm?
 A. Yes, sir.
 Q. Did you get any pay.
 A. No.
 Q. Your father boarded you?
 A. Yes, sir.
 222 Q. What did you do after that—this spring?
 A. I went back on the state roads again.
 Q. What time?
 A. About the 10th of May.
 Q. Same job?
 A. Yes, sir.
 Q. How long did it last?
 A. I was laid off—I quit there about the 20th
 223 of May—the same month; I was only there a little
 while.
 Q. Did the work terminate, or weren't you
 able to do it?
 A. I got tired of working there; there wasn't
 enough money in it.
 Q. You were still getting only \$1.60 a day?
 A. \$2.00 a day then.
 Q. What did you do then?
 224 A. They were short of men at the military
 postoffice at Fort Niagara, and my brother was
 working over there—I took the civil service exam-
 ination about two years before that—my brother
 said they were short of men at the fort and my
 brother got me over there to work, and I have
 been there ever since.

W. M. Collins, for Pltf., Direct.

Q. That was the military postoffice at Fort 225
Niagara?

A. Yes, sir.

Q. Where the officers' training camp is?

A. Yes, sir.

Q. It is also a permanent military post where
the regular soldiers are stationed?

A. There were a few there all winter—not
many.

226

Q. What are your duties there?

A. Sorting mail, and sorting parcel post.

Q. How much pay do you receive?

A. 35 cents an hour.

Q. How much does that figure a month?

A. About \$65.00 or \$70.00 a month.

Q. You now have been drafted?

A. Yes, sir.

Q. You were directed to go to some camp?

227

A. Yes, sir.

Q. What camp?

A. Camp Dix.

Q. You are one of the quota from Allegany
County?

A. Yes, sir.

Q. You were directed to go there when?

A. Friday morning at 9:00 o'clock.

228

Q. Tell us how your face and hands are now,—
not their burns,—we can see them,—but so far as
they affect your comfort?

A. They are very embarrassing to me.

Mr. Ryan: I object to it as incompetent,
immaterial, irrelevant and improper, and
move to strike it out.

Mr. Ward: It is an element of damage.

W. M. Collins, for Pltf., Direct.

229

The Court: Strike it out.

Mr. Ward: Exception.

The Court: Exception noted.

Q. Do you observe, as you go about, that people notice your affliction?

A. Yes, sir.

Mr. Ryan: I object to it as incompetent, immaterial, irrelevant and improper.

230

The Court: Objection sustained.

Mr. Ryan: I move to strike it out.

The Court: Strike it out.

Mr. Ward: Exception.

The Court: You have the exception.

Q. Do you suffer mental anguish and humiliation on account of your burns?

A. Yes, sir.

231

Mr. Ryan: I object to it on the same grounds as before, and also that it is leading.

The Court: I do not think it is necessary to ask a leading question there; I think one question put to him would bring out what you want.

Mr. Ryan: The witness answered it before the objection and ruling—

232

The Court: He may state the character of any mental suffering he has endured.

Q. You may state the character of any mental suffering you endure by reason of your condition.

Mr. Ryan: I object to it as incompetent, immaterial, irrelevant, improper, calling for a conclusion of the witness, and not a proper measure of damages in this case.

The Court: Objection overruled.

W. M. Collins, for Pltf., Direct.

Mr. Ryan: Exception.

233

The Court: Exception noted.

Q. Answer.

A. It is very humiliating to be out in company or any place and people noticing you and making you feel kind of embarrassed, watching you all the time.

Q. You are a single man?

A. Yes, sir.

234

Q. What discomfort,—apart from the embarrassment you speak of—what physical discomfort do you suffer?

A. Very nervous, and the cold air affects my face.

Q. Does your face still chap when it comes in contact with winter weather?

A. Yes, sir.

Q. How about your hands?

235

A. My hands get cold very easily.

Q. Does your face crack open?

A. Yes, sir.

Q. What about your beard?

A. It doesn't grow there, practically,—only in places—in spots.

Q. How do you shave yourself, or do you have the barber do it?

236

A. I have the barber do it usually.

Q. Is that painful to do?

A. Very uncomfortable.

Q. Have you noticed anything about your ears—particularly your right ear, where the outer ear is gone?

A. I get pains in there quite often; the pain seems to go through my ear drum; if I am out

W. M. Collins, for Pltf., Direct.

237 when it is very windy, and the wind happens to blow against it, it fills my ear full of wind and pains me.

Q. Is there any protection left there for the direct wind?

A. No, sir; it has been burned off.

Q. Have you observed any difficulty with your hearing with that ear since the accident?

238 A. My hearing has been affected some.

Q. Both sides, or one side?

A. One side.

Q. On your right?

A. Right side.

Q. Do you have any difficulty working with your hands, as the result of these burns?

A. My thumb is uncomfortable to work with on account of being stiff—it is very uncomfortable.

239 Q. Have you attempted to do any heavy work with it?

A. No, sir.

Q. Which involves friction or chafing?

A. No, sir.

Q. Or constant use of the fingers and thumbs, the same as mechanics or farmers?

A. I tried it, but it used to crack open in there. (Shows).

240 Q. It cracks open?

A. Yes, sir, on the side here.

Q. On the ball of the thumb?

A. On the side here.

Q. You are how tall?

A. About five feet.

Q. Did you have any bodily disfigurement before the accident?

W. M. Collins, for Pltf., Cross.

A. No, sir. 241

Mr. Ward: That is all.

CROSS EXAMINATION by Mr. Ryan:

Q. Were you examined by some physician in Allegany County recently, on behalf of the government?

A. No, sir.

Q. Weren't you physically examined before you were accepted into the army quota? 242

A. I was examined at Niagara Falls.

Q. By what doctor?

A. Dr. Scott.

Q. Did Dr. Scott test your hearing?

A. He did to a certain extent; yes, sir.

Q. Did you tell him that your hearing was impaired in any way?

A. I left it to him to decide. 243

Q. Did you hear my question?

A. Yes.

Q. What was it? Answer the question I put to you.

(Question read by reporter).

A. I did not; no, sir.

Q. How long ago did Dr. Scott examine you?

A. In July some time. 244

Q. July, 1917?

A. Yes, sir.

Q. You have not been examined by any doctor, on behalf of the government, since then?

A. No, sir.

Q. Is that the pail or can which was used in drawing the gasoline, for priming that engine?

(Witness shown tin can).

W. M. Collins, for Pltf., Cross.

245 A. Yes, sir; something similar to that.

Q. That looks exactly like it, doesn't it?

A. Yes, sir.

Mr. Ryan: I offer it in evidence.

Received in evidence, without objection,
and marked Defendant's Exhibit No. 1.

246 Q. While you were employed by the Erie Railroad between December 21st and 25th,—at the time you were injured,—you had telephone communication between your tower and the dispatcher in Buffalo?

A. Yes, sir.

Q. That was the method of communication between you and he,—by telephone, and not by telegraph?

A. We had a telegraph wire in there to Buffalo, too.

247 Q. You had a telegraph wire to Buffalo, too, but the method in use was by telephone?

A. We used to telegraph, too, sometimes.

Q. Did you use it at all between December 21st and 25th, 1915?

A. I used the telegraph to send messages; yes, sir.

248 Q. Between you and the train-master or chief dispatcher?

A. We used to have a night operator on there, and we used to send him telegraph messages on the telegraph wire at night.

Q. Wasn't the usual method of communication in reference to trains, between you and the chief dispatcher, by means of the telephone?

A. Yes, sir.

W. M. Collins, for Pltf., Cross.

Q. And you did not report trains to the chief dispatcher unless you were especially requested by him to do so, did you? 249

A. We did.

Q. What trains did you report?

A. Do you mean the chief dispatcher or the train dispatcher?

Q. The train dispatcher?

A. We were required to report every train that went by, whether he asked or not. 250

Q. Some trains went by there that did not stop?

A. Yes, sir.

Q. You reported to him the trains which did stop at Cannaseraga, as well as the trains which passed through Cannaseraga without stopping?

A. Yes, sir.

Q. Your tower was not at the Cannaseraga station? 251

A. No, sir.

Q. How far away from the station was it?

A. About a mile.

Q. You also made a record, in a book kept in the tower, of the trains which passed Cannaseraga?

A. Yes, sir. 252

Q. As well the trains which stopped there as the trains which went through without stopping?

A. Yes, sir.

Q. Some trains stopped at Cannaseraga which did not take water there?

A. Yes, sir.

Q. So long as there was water in the tank you had nothing to do in reference to the trains taking water?

W. M. Collins, for Pltf., Cross.

253 A. What is that?

Q. I will withdraw the question. You did not direct the trains which stopped at Cannaseraga whether they should take water?

A. No, sir.

Q. The crew of the train had charge of that?

A. Yes, sir.

254 Q. And your only duty in connection with the water was in keeping a supply of it in the tank?

A. Yes, sir.

Q. It was your duty, before leaving the tower, to find out from the train dispatcher at Buffalo whether he had any instructions for you, wasn't it?

A. No, sir.

255 Q. Weren't you required, before leaving the tower to go some other place, to communicate that fact to the train dispatcher in Buffalo?

A. We were always relieved by the man in the morning.

Q. When you were going out temporarily from the tower, weren't you obliged to report to the dispatcher at Buffalo that you were going to leave the tower for a time?

256 A. Sometimes we did, and sometimes we didn't; there was no requirement that I know of.

Q. Wasn't it the usual thing to report when you were about to leave the tower?

A. No, sir, it was not.

Q. Did you do it at times?

A. No.

Q. Did you ever do it?

A. No, sir; there was no place to go only to the pumping station.

W. M. Collins, for Pltff., Cross.

Q. So that on no occasion, when you left the tower, did you report that fact to the dispatcher at the time of leaving? 257

A. If I was going away any length of time, I would ask the dispatcher if it was all right to go.

Q. What do you mean by any length of time? How long?

A. If I was going away half an hour or 20 minutes.

Q. So that, if you were going away for a length of time, as you stated, it was your duty to report to the dispatcher that you were about to leave the tower? 258

A. It wouldn't be a very good thing to do, in case he wanted you, to go without letting him know where I was.

Q. And you reported it in that way, at times, did you? 259

A. I can't say that I did while I was there; I didn't have any place to go while I was there.

Q. How far from the Village of Cannaseraga is your father's farm?

A. About two miles.

Q. In which direction?

A. West.

Q. Cannaseraga is a village of 1500 or 2000? 260

A. I don't think so large as that.

Q. How large is it?

A. I should say 800 or 900.

Q. It has a grammar school and high school?

A. Just high school.

Q. No grammar school?

A. There are three grades of high school after you get out of the grade.

W. M. Collins, for Pltff., Cross.

261 Q. It has a grade school below the high school,
and a high school?

A. Yes, sir.

Q. You attended to grade school at Cannaseraga until you came to the high school grade?

A. Yes, sir.

Q. Then you took three years of high school?

A. On some subjects—I was there three years.

262 Q. You attended high school three years?

A. Yes, sir.

Q. Were you graduated from high school?

A. No, sir.

Q. In what year did you leave high school finally?

A. 1912; after school went out in June.

Q. When you were in high school did you take a course in chemistry?

263 A. No, sir.

Q. Did you take a course in physics?

A. No.

Q. You first obtained employment with the Pittsburg, Shawmut & Northern?

A. Yes, sir.

Q. At Cannaseraga?

A. Yes, sir.

264 Q. You say that place where you were employed there was gasoline engine?

A. There was a gasoline engine there; yes, sir.

Q. There is a station of that road at Cannaseraga?

A. Yes, sir.

Q. For freight and passengers?

A. Yes, sir.

W. M. Collins, for Pltf., Cross.

Q. Where were you employed—at the freight station, passenger station, or both? 265

A. There were both connected together.

Q. A passenger station at one end, and a freight station at the other?

A. Yes, sir.

Q. Where was the gasoline engine located?

A. On the south side of the track.

Q. In the station building?

A. No. 266

Q. In a separate structure?

A. Yes, sir.

Q. That gasoline engine was used for what purpose?

A. Pumping water up into the tank for the trains.

Q. Did you operate that engine at all while you were employed there? 267

A. I did not.

Q. Who operated it while you were there—what man?

A. The station agent operated it part of the time.

Q. What is his name?

A. John Alexander.

Q. Who else operated it? 268

A. The section boss used to operate it.

Q. Was it operated by them in your presence at times?

A. No, sir; I didn't have anything to do with it; the door was usually locked at the pump station.

Q. Were you ever over there when they did operate it?

W. M. Collins, for Pltf., Cross.

269 A. No, sir.

Q. You then went to Warsaw?

A. I finished school—a year in school.

Q. Then went to Warsaw?

A. Yes, sir.

Q. So that you were in high school later than 1912?

A. No, sir.

270 Q. Then you were employed by the P. S. & N. prior to 1912?

A. It was 1911 that I was with the P. S. & N.

Q. You said that in 1917, or 1915, before you were injured, you knew nothing of the explosive qualities of gasoline?

A. No, sir.

Q. What did you mean by that?

271 A. Never had any experience with it, and never came in contact with it.

Q. Do you mean to tell the jury that before December, 1912, you did not know of the explosive qualities of gasoline?

A. I never paid much attention to it.

Q. I didn't ask you whether you paid much attention to it. Do you want to tell the jury that prior to December, 1915, you did not know of the explosive qualities of gasoline?

272 A. No, sir.

Q. That is you do not want to tell them that?

A. I didn't know.

Q. Prior to December, 1915, when you were injured, did you know that gasoline would explode?

A. No, sir; I thought it might take a whole lot to explode it.

W. M. Collins, for Pltf., Cross.

Q. Will you answer the question? Did you 273
know, prior to December 25th, 1915, that gasoline
would explode?

A. No, sir.

Q. Do you mean that?

A. Yes, sir.

Q. That prior to December 25, 1915, you did
not know that gasoline, when brought in contact
with flame, would explode?

A. No, sir, I never thought about what it 274
might do—I never gave it a thought.

Q. Do you know from what, or in what way
gasoline is obtained?

A. No, sir, I do not.

Q. Do you know that gasoline is obtained from
petroleum?

A. No, sir, I do not.

Q. You don't know that now? 275

A. I never thought of it enough to state—

Q. I did not ask you what you thought. Do
you know what petroleum is?

A. No, I don't.

Q. You went to high school in Cannaseraga
three years?

A. Yes, sir.

Q. And you don't know what petroleum is? 276

A. No, sir.

Q. Do you know whether petroleum is manu-
factured or drawn from the earth?

A. I cannot say as to that.

Q. You never heard of petroleum?

A. I heard of it, but I don't know where it is
obtained.

Q. What do you think it is?

W. M. Collins, for Pltf., Cross.

- 277 A. What's that?
Q. What do you think petroleum is?
A. It is some kind of liquid, I think.
Q. You think perhaps it is manufactured?
A. I didn't know where it was obtained.
Q. You don't know now that petroleum is extracted from the earth?
A. I can't say that I do know it.
- 278 Q. Do you know it now?
A. I do not; no, sir.
Q. You haven't any idea what petroleum is?
A. No, sir.
Q. They have a pretty good high school at Cannaseraga, haven't they?
A. Yes, sir.
Q. Did you try any Regents' examinations while there?
- 279 A. Yes, sir.
Q. In what subjects did you pass Regents' examinations?
A. Algebra, English, Ancient History and American History.
Q. What else?
A. First year Latin.
Q. What else?
A. Drawing.
- 280 Q. What else?
A. I can't say any more.
Q. Did you pass in spelling?
A. That doesn't come in high school.
Q. You passed the Regents' examination in spelling?
A. Yes, sir.
Q. And in geography?

W. M. Collins, for Pltff., Cross.

A. Yes, sir. 281

Q. Yet, up to this time, you have not learned what petroleum is?

A. I probably learned, but forgot it.

Q. That is what I am trying to find out; do you know what it is?

A. I probably knew at the time, but I don't know now what it is.

Q. What do you think about December, 1915,— do you think you knew then what petroleum was? 282

A. I can't say I did.

Q. Did you ever know about drilling into the earth and rock for petroleum?

A. No.

Q. Do you know what kerosene oil is?

A. Yes, sir.

Q. Do you know how that is obtained?

A. I know part of it, I can't say I know all the process of it. 283

Q. Where is that obtained?

A. Obtained from the ground.

Q. Where is gasoline obtained from?

A. I can't say.

Q. You think gasoline is a manufactured article?

A. I can't say what it is. 284

Q. You have at Cannaseraga a large number of automobiles operated through the village there?

A. Yes, sir.

Q. And did have prior to December, 1915?

A. Yes, sir.

Q. Of what kinds were those, as far as the power of operation is concerned?

A. What kinds were they?

W. M. Collins, for Pltj., Cross.

285 Q. Yes, sir?

A. I can't say.

Q. Gasoline cars?

A. Yes, sir, I suppose they were.

Q. When you were hurt you were 21 years old?

A. Yes, sir.

286 Q. Prior to that time, didn't you know that gasoline was used in those automobiles that were operated through Cammaseraga in order to provide power for them?

A. Yes, sir.

Q. You knew that power was provided by exploding the gasoline, didn't you?

A. I don't know what process it had in starting it.

287 Q. Will you say you did not know that the power was provided by the exploding of the gasoline?

A. I can't say how it was provided, but I know they were run by gasoline; I don't know the process of it.

Q. You knew gasoline was used in operating and in providing power for automobiles?

A. Yes, sir.

288 Q. What was your idea of the way that force was furnished through the use of gasoline?

A. I didn't have any idea about it.

Q. Did you think the gasoline, in its liquid state, ran through the engine of the automobile and ran out of the other end?

A. I couldn't say.

Q. Was that your idea of it?

A. I didn't have any idea; I didn't have anything to do with automobiles.

W. M. Collins, for Pltf., Cross.

Q. It never occurred to you, prior to December, 1915, that the power was furnished to the engine of an automobile by the explosion of the gasoline? 289

A. No, sir.

Q. Yet, prior to that date, you had seen about Cannaseraga hundreds of automobiles?

A. Yes, sir.

Q. That you were informed were driven by gasoline? 290

A. I thought they were; I saw them taking gasoline—I know they were operated by gasoline.

Q. Will you say to the jury that it was your idea that the power was furnished by the liquid gasoline running in one end of the engine and out of the other?

A. No, sir, I will not.

Q. Was that your idea of it? 291

A. Never had any idea how they were operated.

Q. You never knew that the gasoline exploded in the engine—in the cylinder of the engine of the automobile.

A. No, sir.

Q. Did you ever see smoke escaping from the pipe of an automobile, at the rear? 292

A. Yes, sir.

Q. Where did you think that came from?

A. I thought it was some kind of exhaust off from the machine.

Q. Have you seen that a great many times prior to December, 1915.

A. I noticed smoke coming out of the rear end of automobiles several times.

W. M. Collins, for Pltf., Cross.

293 Q. You knew gasoline was going into the engine of the automobile, did you not?

A. I knew they used gasoline to operate it with.

Q. And you saw smoke coming out of the rear?

A. Yes, sir.

Q. Yet it never occurred to you that that force that propelled the automobile came from the ignition of gasoline?

294 A. No, sir.

Q. Never knew it prior to December, 1915?

A. No, sir.

Q. In December, 1915, did you know that gasoline was inflammable, and if you put a lighted match to it, it would ignite?

A. No, sir.

295 Q. At that time you knew kerosene oil was inflammable?

A. I knew kerosene oil would burn; I saw it burning in the stove.

Q. In December, 1915, didn't you know that gasoline would burn if you applied a match to it?

A. No, sir; I never had anything to do with gasoline.

296 Q. I didn't ask you if you ever had anything to do with gasoline. You have knowledge of a great many things that you never had anything to do with, haven't you?

A. Yes, sir.

Q. So that it is possible for a person to have knowledge that gasoline is inflammable, without havin applied a match to a can of it?

A. I cannot say that I knew it.

W. M. Collins, for Pltf., Cross.

Q. Will you swear to this jury, that in December, 1915, you did not know that if you applied a match to gasoline it would burn? 297

A. Yes, sir, I will.

Q. You did not know it?

A. No, sir.

Q. You remember, in December, 1915, when you entered this pump house with—who was the employee of the Erie who instructed you? 298

A. Robert Pinkney.

Q. You carried a lantern?

A. Yes, sir.

Q. You were holding the lantern so that Mr. Pinkney could pour the gasoline into the cylinder cock?

A. Yes, sir.

Q. Did you put the lantern around down near the cylinder cock? 299

A. I was holding the lantern for him.

Q. Did you hear the question? Did you put it around down near the cylinder cock?

A. No.

Q. What did you do with the lantern in its relation to the cylinder cock?

A. I held the lantern all the time that he was in there, for him. 300

Q. How far away from the cylinder cock?

A. Probaby five feet.

Q. Did Mr. Pinkney tell you to hold it away from the cylinder cock, so that the gasoline would not become ignited?

A. No, sir.

Q. So that, without any information from Mr. Pinkney that night, you knew enough to hold the

W. M. Collins, for Pltf., Cross.

301 lantern away from the cylinder cock so that the gasoline would not become ignited, didn't you?

A. No, sir, I didn't.

Q. Why did you hold it five feet from the cylinder cock?

A. I didn't pay much attention to it; I held it up so that he could see from the rays of light on the engine.

302 Q. But you held it five feet away from the cylinder cock?

A. Why I held it away—

Q. Answer the question. You held it five feet away from the cylinder cock, didn't you?

A. Probably; yes, sir.

Q. The desirable thing was to get light on the cylinder cock, wasn't it?

A. Yes, sir.

303 Q. And the nearer you brought the lantern to the cylinder cock, the more light it shed to help Mr. Pinkney—

A. The higher you hold a lamp, the better light you get.

Q. Do you mean to say you get more light if you hold the lantern five feet away from the cylinder cock than if you hold it up six inches from it?

304 A. I couldn't say.

Q. Don't you think, if you held the lantern six inches from the cylinder cock you would have more light on the work that he was doing?

A. He didn't say anything about it.

Q. I am leaving that to you. If you held it within six inches of the cylinder cock, would Mr. Pinkney have a better light than if you held it five feet away?

W. M. Collins, for Plif., Cross.

A. Yes, sir; probably would; yes, sir.

305

Q. You knew Mr. Pinkney wanted light on the operation there?

A. Yes, sir.

Q. That is what he had you holding the lantern for?

A. Yes, sir.

Q. You did not hold the lantern five feet away from the cylinder cock in order to give a better light, did you?

306

A. I couldn't say as to that; he had light enough where I was holding it.

Q. Why did you hold the lantern five feet away from the cylinder cock when Mr. Pinkney was there, rather than up close to it, if you didn't know that gasoline would ignite?

A. There was nobody else there the night I was there to hold the light.

307

Q. But you could hold it six inches from the cylinder cock just as well as five feet away?

A. Yes, sir.

Q. And given Mr. Pinkney a better light for what he was doing?

A. Yes, sir.

Q. But you say the lantern, at that distance, shed sufficient light on the work?

308

A. Yes, sir, where I was holding it—it did for him.

Q. Can you give any explanation to the jury why you held the lantern five feet away, if you did not know gasoline was inflammable?

A. I can't say what was the reason for holding it away, only there was a cement floor about the bottom of the engine, and if I wanted to hold it

W. M. Collins, for Pltf., Cross.

309 closer I must stand on the cement floor; it came to me that I would stand back and hold the lantern up for him.

Q. How high was that cement floor about the engine above the general level of the floor?

A. I think six inches.

Q. There was no difficulty about standing on that cement floor, was there?

310 A. I thought it was just as handy to stand on the bottom of the pump station.

Q. You cannot think of any other reason for holding that lantern five feet from the cylinder cock when Mr. Pinkney was there, except you did not want to stand on the concrete base of the engine?

A. I didn't think about standing on there, but he was getting enough light where I was.

311 Q. Can you think of any other reason for holding the light off five feet from the cylinder cock than the one you gave us?

A. No, sir.

Q. And you say you did not hold it away from the cylinder cock by reason of any directions Mr. Pinkney or anybody else gave you?

A. No, sir.

312 Q. You held it that distance away of your own suggestion and volition?

A. Yes, sir.

Q. And that was three or four days before you were injured?

A. Yes, sir.

Q. In what year did you first learn about running a gasoline engine, either at Cannaseraga or this pumping station?

W. M. Collins, for Pltff., Cross.

A. The first year I ran it was in the spring of 1913. 313

Q. I didn't ask you the first year you ran it, I asked you when you learned to run it?

A. I learned to run it when my brother was there; I don't remember what year it was.

Q. What year do you think it was?

A. I think in 1908, or 1909.

Q. So that, for seven or eight years before you were hurt you knew the method of operation of this gasoline engine? 314

A. I didn't know it exactly; I didn't know all the principal operations of it.

Q. You knew it as you have described it here to us, didn't you?

A. What is the question?

Q. You knew how it operated, as you have described the operation here to us? 315

A. Yes, sir.

Q. That was before you got into the Cannaseraga high school, that you learned how to operate that gasoline engine?

A. While I was going to high school.

Q. You learned how to operate that gasoline engine?

A. At the time you learned how to operate it your brother was employed there as telegraph operator? 316

A. Yes, sir.

Q. And he told you how to operate that engine?

A. He didn't give me any directions; I wasn't connected with it at all.

Q. He didn't give you any directions, but he told you the method of operation?

W. M. Collins, for Pltf., Cross.

317 A. No, sir.

Q. Didn't he?

A. No, sir.

Q. Then how did you learn from him how to operate it?

A. Simply watching him start the thing at different times.

318 Q. So that, without any instructions whatever, as far back as 1908 or 1909, you learned from observation how to operate that gasoline engine?

A. Yes, sir.

Q. You learned, about as far back as that, about drawing gasoline from the little pet cock at the rear?

A. Yes, sir.

319 Q. And as far back as 1908 or 1909, you learned about priming the cylinder or priming the engine by pouring gasoline into the cylinder cock?

A. Yes, sir; that is what they all done.

Q. That is the way you learned to do it in 1908 or 1909?

A. Yes, sir.

Q. In 1908 or 1909 you learned about connecting the electric spark?

A. Yes, sir.

320 Q. In 1908 or 1909, you learned about the big drive wheel it had to turn?

A. Yes, sir.

Q. In 1908 or 1909, you learned about that match-head—about putting the match head in and covering it up in the cylinder?

A. Yes, sir.

Q. What did you think that match-head was put in there for?

W. M. Collins, for Pltf., Cross.

A. I couldn't say what it was put in there for; 321
I never knew.

Q. Do you know what the head is on a match
for?

A. Yes, sir, I do.

Q. What is it for?

A. To give light.

Q. Is it to strike fire?

A. That is what they use them for; yes, sir. 322

Q. That is one thing you knew in December,
1915?

A. Yes, sir.

Q. In 1908 or 1909, how old were you then—
about 15 years old?

A. Yes, sir.

Q. In those years you watched your brother,
on numerous occasions, operating that gasoline
engine? 323

A. Yes, sir.

Q. In all the steps that were necessary to
start it?

A. Yes, sir.

Q. And every time you watched him start it
you saw him take a match-head and put it in the
cylinder slot and cover it up in there?

A. Yes, sir. 324

Q. Did it ever occur to you what that match-
head was put in there for?

A. No, sir.

Q. What is that?

A. No, sir.

Q. What did you think it was put in there for?

A. I didn't know what it was put in there for.

Q. You knew they put gasoline in the cylinder?

W. M. Collins, for Pltf., Cross.

325 A. Yes.

Q. You knew they put a match-head in there following the gasoline?

A. Yes, sir.

Q. And it never occurred to you that the match-head was put in there to provide fire to ignite the gasoline?

A. I didn't know gasoline was explosive.

326 Mr. Ryan: I ask that the answer be stricken out as not responsive.

The Court: Strike it out.

Q. Did you hear the question?

A. Yes, sir.

Q. (Question read by reporter).

A. No, sir.

327 Q. Every time the engine was started you saw your brother—or every time you saw your brother start it, you saw him break off a match-head and put it in the cylinder where the gasoline was?

A. Yes, sir.

Q. And cover up the match-head in there before he turned the wheel?

A. Yes, sir.

Q. What did you think was going to happen to that match-head in there?

328 A. I didn't know.

Q. Did you think it would be dissolved by the gasoline?

A. I didn't know what would happen to it.

Q. How many times did you see your brother start that engine?

A. I couldn't say; possibly ten times.

Q. And you, through observing him, became so familiar with this method of operating that gaso-

W. M. Collins, for Pltf., Cross.

line engine, that when you went to work for the Erie in 1913, you were able to operate it without any instructions? 329

A. Yes, sir.

Q. Just from observing your brother?

A. Yes, sir.

Q. You knew just what steps to take in starting that engine, from the time of drawing the gasoline into the little can until the engine was in operation? 330

A. Yes, sir, after I started it a couple of times.

Q. You knew it from observing your brother?

A. Lots of times he started it it didn't always run the first time.

Q. It wouldn't always start the first time?

A. No, sir.

Q. Often times an automobile engine doesn't start the first time, does it? 331

A. I don't know.

Q. But you observed enough from observing your brother in 1909 and 1909 and 1910, so that you were able to start the engine in 1913, without any instructions from anybody?

A. Yes, sir.

Q. Yet, in all the times you saw your brother start it, the thought never occurred to you that the match-head was put in there in order to ignite the gasoline? 332

A. No, sir.

Q. Did you ever have any thought at that time as to the purpose of putting that match-head in there?

A. No, sir, I didn't.

W. M. Collins, re-called for Pltf., Cross.

333 Q. You saw it done every time the engine was started?

A. Yes, sir.

Q. Still you never knew it was to strike fire?

A. I couldn't say—I didn't know what it was for.

Q. Will you swear you did not know?

A. Yes, sir.

334 Q. That it was put in there to ignite the gasoline?

A. Yes, sir.

Q. Will you swear you did not know that match-head was put in there in order to start a fire?

A. Yes, sir.

Recess here taken until 2:00 o'clock p. m.
Afternoon proceedings.

335

WILLIAM M. COLLINS, re-called in his own behalf:

Further Cross Examination by Mr. Ryan:

336 Q. Mr. Collins, prior to the time of the accident, did you ever notice that gasoline driven automobiles made explosive noises at times?

A. Yes, sir.

Q. Did you frequently observe that before the accident?

A. I noticed it several times in automobiles.

Q. That automobiles driven by gasoline made explosive noises when the smoke was driven out at the end of the exhaust pipe?

W. M. Collins, re-called for Pltff., Cross.

A. Yes, sir.

337

Q. Did that ever indicate to you that gasoline had an explosive character and quality?

A. No, sir.

Q. What did you think made that noise?

A. Well, it might have been the spark, or gasoline, or something.

Q. If it came from the spark in the gasoline, it came from the explosion of the gasoline, didn't it? 338

A. Yes, sir.

Q. And that you understood before the accident, didn't you?

A. Yes, sir.

Q. So that, before the accident occurred, you knew that the application of a spark to gasoline would explode it, didn't you? 339

A. Yes, sir.

Q. What did you mean when you said to the jury this morning that you didn't know before you were hurt that gasoline had an explosive quality?

A. I thought the gasoline was explosive, but the vapor, I didn't think, was explosive.

Q. So that, prior to the accident, you knew that gasoline had an explosive quality?

A. I heard it exploding in automobiles. 340

Q. Did you ever hear it explode any other place?

A. No, sir.

Q. Did you ever hear it explode in this gasoline engine, in the cylinder?

A. No, sir, I didn't.

Q. Never did before the accident?

A. Not to notice it much.

W. M. Collins, re-called for Pltf., Cross.

341 Q. Not to notice it much? To notice it at all?

A. What kind—I noticed the exhaust; that was all I noticed in the gasoline engine.

Q. Did you ever notice, in this gasoline engine, before the accident, an explosive sound when the engine was started up?

A. A slight noise; I couldn't say whether it was an explosion or what it was.

342 Q. Didn't it sound like an explosive noise to you?

A. No, sir.

Q. And didn't that explosive noise keep up as long as the engine was in operation and exhausting?

A. Yes, sir, I suppose so.

Q. No supposing about it; you were there and heard it, weren't you?

343 A. Yes, sir.

Q. Why do you say that you supposed it did?

A. I wasn't acquainted with it so as to know it was an explosion; I heard the noise coming from the engine.

344 Q. So that, when you were a boy, watching your brother operating this engine, you heard that explosive sound in the cylinder when the engine began to move, did you not?

A. Yes, sir.

Q. Didn't that indicate to you the gasoline was exploded?

A. I knew there was some substance in the gasoline that was exploded, that was all.

Q. You knew that in 1909 and 1910, didn't you?

A. Yes, sir.

W. M. Collins, re-called for Pltff., Cross.

Q. You knew that by bringing an electric spark in contact with gasoline in the cylinder of the engine that an explosion was caused, in 1909 and 1910, didn't you? 345

A. Yes, sir.

Q. Do you think you told the jury the whole truth this morning about your knowledge of the explosive quality of gasoline?

A. I think I did. 346

Q. Did you admit this morning that you had knowledge that you say now that you did have?

A. Yes, sir.

Q. You think your testimony now is in harmony with your testimony this morning?

A. Yes, sir.

Q. You have talked this over with your counsel during the noon hour, haven't you?

A. No, sir. 347

Q. You have not mentioned the question of your knowledge of gasoline?

A. No, sir.

Q. Not at all?

A. No, sir.

Q. Haven't mentioned anything in connection with this case and your testimony, to him, during the noon hour? 348

A. We were talking about the case; yes, sir.

Q. And about your testimony this morning, too?

A. No, sir.

Q. You did not mention anything that you said on the stand?

A. No, sir.

Q. Sure about that?

W. M. Collins, re-called for Pltf., Cross.

349 A. He was talking about the case.

Q. And about what you testified to?

A. Yes, sir.

Q. So that, during noon hour, you talked with your counsel about your testimony this morning?

A. Yes, sir.

Q. And about what you said about being ignorant of certain things, haven't you?

A. Yes, sir.

350 Q. Now you come back on the stand this afternoon and say that before this accident occurred you did know that gasoline had an explosive quality, do you?

A. Yes, sir.

Q. And when you were hurt in December, 1915, you knew that gasoline was inflammable, did you not?

351 A. I knew there was a power to the gasoline—an explosion, when you started this engine.

Q. When you watched your brother, in 1908 and 1910, operate this engine, what was the first step he took?

A. He took gasoline out of the cylinder.

352 Q. I show you a photograph in evidence, marked Exhibit No. 2; that photograph shows the cock from which the gasoline was drawn for the purpose of priming the engine, does it not? (Shows).

A. No, sir.

Q. Isn't the pet cock, from which the gasoline was drawn, in the end of the cylinder there?

A. No, sir; here is the cylinder over here. (Shows).

Q. Here is this cylinder; what is that light spot at the end of the cylinder? (Shows).

W. M. Collins, re-called for Pltf., Cross.

A. I can't say what it is. 353

Q. Isn't that the location of the pet cock?

A. No, sir.

Q. Where is the pet cock located?

A. On the end of this cylinder. (Shows).

Q. Isn't it at the end of the cylinder I show you?

A. No.

Q. Is the pet cock located on the other end of the cylinder? 354

A. On the front end.

Q. Which end of the cylinder are you looking at?

A. This doesn't appear to me to be the front end of the engine.

Mr. Ryan: I have another photograph here, which I asked to have marked for identification. 355

Photograph marked Defendant's Exhibit No. 2, for identification, only.

Q. I show you this photograph, just marked Defendant's Exhibit No. 2, for identification; this photograph shows the rear of the cylinder, does it not? (Shows).

A. Yes, sir.

Q. So that the photograph marked Plaintiff's Exhibit No. 2 shows the front of the cylinder? 356

A. I see now; that is the front of the engine here; I couldn't see with the light; I see it here now.

Q. So that in the photograph I showed you first,—Plaintiff's Exhibit No. 2,—on the front of the cylinder is shown the pet cock from which you drew the gasoline for priming purposes?

8
9

W. M. Collins, re-called for Pltf., Cross.

357 A. Yes, sir.

Q. The one from which your brother drew it, when you watched him, and the one from which you drew it on the night of the accident?

A. Yes, sir.

Q. The cylinder to which we refer in this photograph is the drum like structure or cylindrical structure about the center of the photograph running horizontally?

358 A. Yes, sir.

Q. And the same cylinder shown in the photograph marked Defendant's Exhibit No. 2, for identification?

A. Yes, sir.

Q. Did your brother,—when you watched him in 1908 and 1910,—use a container about the same as the one exhibited here?

359 A. I cannot say what kind of can he used.

Q. Something similar to that? (Shows).

A. I cannot say.

Q. As you watched him, what was the next step your brother took towards operating the engine?

A. He poured gasoline in the top of the cylinder.

360 Mr. Ryan: Here is another photograph, which I ask to have marked for identification.

Photograph marked Defendant's Exhibit No. 3, for identification, only.

Q. This photograph, marked Exhibit No. 3, for identification, shows the small pump with which you pumped the gasoline into the pail? (Shows).

A. Yes, sir.

W. M. Collins, re-called for Pltf., Cross.

Q. Down there between the spokes of the driving wheel? 361

A. Yes, sir.

Q. If we call the first spoke at the bottom of the picture No. 1,—the pump is shown between spoke No. 1 and the spoke following it,—No. 2? (Shows).

A. Yes, sir.

Q. You say the second step, as you saw him performing the operation, was to pour the gasoline from the container, into which he drew it, into the cylinder? 362

A. Yes, sir.

Q. Through the cylinder cock?

A. Through the top of the cylinder.

Q. There was an opening in the top of the cylinder?

A. Yes, sir.

Q. What do you call that opening? 363

A. I can't say what it was.

Q. You say that was about three-quarters of an inch in diameter?

A. Yes, sir.

Q. There was a screw cover on the top of the opening, wasn't there?

A. Yes, sir.

Q. And that had to be unscrewed before the gasoline was poured in? 364

A. Yes, sir.

Q. What was the next step your brother took towards priming or starting the engine?

A. He had to take part of a match and place it in the end of the screw that he took off the top of the cylinder.

W. M. Collins, re-called for Pltf., Cross.

365 Q. Which part of the match did he place in that screw?

A. I suppose the wooden part of it.

Q. The head?

A. Yes, sir, the head—with the head sticking out.

Q. Then what did he do?

A. Screwed it back on again.

366 Q. With the match-head in there?

A. Yes, sir.

Q. After he screwed it back on, did he have to shove it down with his hand.

A. Not just then; no, sir.

Q. What was the next step that he took after he screwed on the top which contained the match-head?

A. He had to take the rest of the gasoline and
367 pour it into the air pump.

Q. Through what opening was that done?

A. There was a little slide in the bottom of the air pump that moved around.

Q. The air pump is shown with the lever handle in this photograph marked Defendant's Exhibit No. 3, for identification, is it not? (Shows).

A. Yes, sir.

368 Q. You say that in the bottom of that pump there was a slot, through which the gasoline was poured?

A. Yes, sir; or a slide, that you could move around.

Q. Does that slide show in the photograph?

A. Yes, sir.

Q. Then the next step?

A. He turned on the electric switch.

W. M. Collins, re-called for Pltff., Cross.

- Q. Where was that switch located? 369
- A. On the board above the engine.
- Q. At that time—in those years, 1909 and 1910,—you knew something of the qualities of electricity, did you not?
- A. I can't say that I did know much about it.
- Q. Didn't you know that electricity would give light?
- A. Yes, sir. 370
- Q. And that it would burn you?
- A. Yes, sir.
- Q. And that the purpose of turning it on with that switch was to provide a spark in that cylinder,—didn't you?
- A. I can't say I knew what it was for.
- Q. Didn't you know why that electricity was turned on?
- A. I didn't exactly know; he had to go through that performance. 371
- Q. Not exactly? Why did you think he went through that performance?
- A. I couldn't say that I knew.
- Q. You have talked here this afternoon about a spark in the gasoline, haven't you.
- A. Yes, sir.
- Q. Did you ever, before your injury, hear about electricity in connection with gasoline? 372
- A. No, sir.
- Q. You knew that the electric switch was turned on by your brother to provide an electric current, or deliver an electric current to this engine?
- A. Yes, sir.

W. M. Collins, re-called for Pltf., Cross.

373 Q. You knew the engine did not start until after the electricity was connected up?

A. Yes, sir.

Q. What was the next step, after the switch was turned on, as you observed your brother doing it?

A. He started pumping on that air pump.

Q. And pumped until what time?

374 A. Until the big fly wheel started moving.

Q. What then?

A. He hit the little plug where the match was in the end of it.

Q. Didn't he hit the plug with his hand in order to strike a light with that match?

A. I suppose the match went off in there.

375 Q. You knew, when you watched your brother doing that in 1909 and 1910, that the match went off in there?

A. Yes, sir.

Q. Why did you tell us this morning that you did not know what the match was put in there for?

A. I knew it had something to do with the engine, but I couldn't say I knew what it was.

Q. You knew it lighted in there, didn't you?

A. It must have lighted in there.

376 Q. What did you think the purpose of lighting that match in there was?

A. I couldn't say.

Q. You didn't have any idea?

A. Unless to have a spark or something.

Q. You didn't imagine it was for the purpose of having it lighted and then to go out immediately?

A. No, sir.

W. M. Collins, re-called for Pltf., Cross.

Q. You knew it was lighted in there to ignite something else? 377

A. Yes, sir.

Q. What did you think it ignited--the electric current?

A. No, sir,—the gasoline.

Q. You knew that in 1909 and 1910, didn't you?

A. I couldn't say I knew then; no, sir.

Q. You knew, in 1909 and 1910, the purpose of striking the cover that contained the match was to light the match? 378

A. Yes, sir.

Q. And you knew at that time that the match was lighted to light something else?

A. Yes, sir.

Q. And you knew that something else to be lighted was the gasoline in the cylinders, didn't you? 379

A. Yes, sir.

Q. Now, then, when the match was lighted by pressing down on that little cover which contained it, what followed?

A. The fly wheel went over.

Q. The fly wheel went over when the air pressure was sufficient, didn't it? 380

A. Yes, sir.

Q. As soon as the fly wheel started turning over, the match was lighted by the force of the hand?

A. Yes, sir.

Q. Then what followed?

A. The engine kept on running.

W. M. Collins, re-called for Pltf., Cross.

- 381 Q. Then the engine started to run?
A. Yes, sir.
Q. And started to exhaust?
A. Yes, sir.
Q. And exhausted smoke?
A. Yes, sir.
Q. Where was the exhaust pipe?
A. On top of the building.
- 382 Q. You observed, in 1909 and 1910, when you watched your brother, that exhaust, did you not?
A. Yes, sir.
Q. You knew it exhausted smoke, did you not?
A. Yes, sir.
Q. You knew there wouldn't be smoke unless something had been consumed?
A. Yes, sir.
- 383 Q. Didn't you have some idea then that it was the gasoline which had been consumed?
A. I did; yes, sir.
Q. Certainly. So that in 1909 and 1910, you knew the gasoline was exploded in the cylinders, didn't you?
A. Yes, sir.
- 384 Q. By the contact of the electric spark with the gasoline in the cylinders?
A. I couldn't say that; I didn't know what these things were for.
Q. You told us you knew the purpose of that electricity was to start a fire?
A. Yes, sir.
Q. Then you observed in 1909 and 1910, which this engine was running, in connection with this exhaustion, noises of the explosions, didn't you?

W. M. Collins, re-called for Pltf., Cross.

A. Yes, sir.

385

Q. So that, when you came to work for the Erie Railroad Company in 1913, you were able to start the engine without any instructions?

A. By remembering what he told me—what he had done—I was able to start the engine.

Q. That is, from what you learned from watching your brother in 1909 and 1910?

A. Yes, sir.

386

Q. You retained that information for a period of three years?

A. Yes, sir.

Q. How long did you work for the Company in 1913?

A. Worked until the 1st of September.

Q. How long in weeks or days?

A. That is 1913?

387

Q. Yes?

A. From the 1st of January until the 1st of September.

Q. All that time days?

A. I was an extra man; I was all over—night and day.

Q. How long did you work at this particular tower or pump house in 1913?

A. About ten days.

388

Q. During that time you say you operated this gasoline pump at least five times?

A. Yes, sir.

Q. And every time you drew the gasoline into the pail from the pet cock?

A. Yes, sir.

Q. Poured it into the cylinder?

W. M. Collins, re-called for Pltf., Cross.

389 A. Yes, sir.

Q. Poured more of it into the slot under the air pump?

A. Yes, sir.

Q. Turned on the electric current by means of the switch?

A. Yes, sir.

390 Q. Put a match head into the little container, and lighted it by a pressure of your hand?

A. Yes, sir.

Q. And saw the engine start up?

A. Yes, sir.

Q. So that, when you left there in 1913, after you had operated it—started it these times,—you understood the method of starting that engine pretty well, didn't you?

391 A. I knew what was required to start it.

Q. You knew, in order to start it, it was necessary to bring an electric current in contact with the gasoline?

A. Yes, sir—what is the question?

Q. (Question read by reporter).

A. I didn't know it was necessary—I knew you had to do it.

392 Q. If you had to do it, it was necessary, wasn't it?

A. Yes, sir, I believe so.

Q. Every time, in 1913, that you started it, you put a match head in there and lighted it before the engine started?

A. Yes, sir.

Q. And turned on the electric current before the engine started?

A. Yes, sir.

W. M. Collins, re-called for Pltf., Cross.

Q. And every time, in 1913, that you started 393
it, you put gasoline into the cylinder before you
lighted the match?

A. Yes, sir.

Q. Did it occur to you that there was anything
significant in the way those things were done—
putting in the gasoline first, and lighting the
match later?

A. No, I didn't think it was anything out of 394
the ordinary; they always done so.

Q. You did not imagine the proper way to do
it would be to light the match first and put the
gasoline in afterwards, did you?

A. I didn't pay particular attention to it.

Q. You didn't do it in that reverse order,—of
lighting the match first and putting in the gaso-
line afterwards?

395

A. No, sir.

Q. So that you understood then the necessity
of having the gasoline in the cylinder when you
struck off the match?

A. I knew they put the gasoline in before
they struck the match off.

Q. You understood it was necessary to have
gasoline in the cylinder before you lighted the
match, didn't you ?

396

A. Yes, sir.

Q. This photograph, which we have marked
Exhibit #3, for identification, there shows the
gasoline engine, or part of it, as you recall its
appearance, does it not?

A. Yes, sir.

Mr. Ryan: I offer it in evidence.

W. M. Collins, re-called for Pltf., Cross.

397 Mr. Ward: As a part of your case?

Mr. Ryan: Yes, sir.

The Court: Received.

Photograph received in evidence, without objection, as Defendant's Exhibit #3.

Mr. Ryan: I also offer in evidence the photograph marked Exhibit #2, for identification.

398 The Court: Received.

Photograph received in evidence, without objection, as Defendant's Exhibit #2.

Q. In the photograph, Exhibit D-2, do you see the opening in the cylinder into which you poured the gasoline?

A. Yes, sir.

Q. Where is it?

399 A. Down on the front end of the cylinder. (shows).

Q. How is that indicated? What is there on the photograph that indicates it?

A. A spring sticking up out of the top.

Q. What does that spring indicate in reference to the place where the head of the match was placed?

400 A. Placed on the other end of that bolt that projects down into that hole.

Q. That is the container of the match head and the opening in the cylinder into which you poured the gasoline are right together on top of the cylinder?

A. There is a bolt that goes down through the hole, and the match was placed on the end of it and screwed on top of it.

W. M. Collins, re-called for Pltf., Cross.

Q. Is there any appreciable difference between the spring which indicates the location of the match head, and the opening in which you poured the gasoline? 401

A. No, sir.

Q. They are right together?

A. Yes, sir.

Q. So that the spring indicates, practically, the location of both of them? 402

A. Yes, sir.

Q. The view of the cylinder shown here is the rear view,—in the photograph, Exhibit #2 for the defendant?

A. Yes, sir.

Q. This photograph which I now show you is another view of the engine?

(Witness shown another photograph). 403

A. Yes, sir.

Q. That is looking—the camera was pointed towards which wall of the pump house? Can you tell from the photograph?

A. Towards the north side.

Q. Which is the north side—away from the track?

A. Towards the track.

Mr. Ryan: I offer the photograph in 404 evidence.

The Court: Received.

Photograph received in evidence, without objection, and marked Defendant's Exhibit #4.

Q. In the foreground of the photograph Plaintiff's Exhibit #2, is shown the water pump? (shows).

W. M. Collins, re-called for Pltf., Cross.

405 A. Yes, sir.

Q. Over north is towards the track. In which direction is the pump? North of the engine, or south of it, or is it east of it, or west of it?

A. West of the engine.

Q. So that the long direction of the engine and pump are parallel with the track?

A. Yes, sir.

406 Q. And the engine part is towards Hornell?

A. Yes, sir.

Q. And the pump part towards Buffalo?

A. Yes, sir.

Q. What are these benches shown down here to the east—is that the east side? (shows).

A. South side.

Q. What are those benches?

407 A. They are to put oil or stuff on there.

Q. Work benches built in there?

A. Shelves.

Q. Were they there when you worked there in 1913?

A. I don't remember.

Q. Were they there at the time of the accident?

A. I don't remember that.

408 Q. Shown on this photograph here,—running from the pump to the right of the photograph,—and on a horizontal line, is a pipe; what is that pipe? (shows).

A. I don't know what it is for.

Q. Isn't that the pipe through which the water came into the pump; isn't that what you knew as the water pipe?

W. M. Collins, re-called for Pltf., Cross.

A. I think it is a water pipe, but I can't say 409
what it was for.

Q. What did you think the engine was doing
when it was working there?

A. It was pumping water.

Q. Was that the only pipe running to the
pump?

A. I couldn't say.

Q. You didn't see any other pipes there, did 410
you?

A. No.

Q. On the night of the accident, you say you
left the door of the pump house open when you
entered?

A. Yes, sir.

Q. What was the weather that night?

A. It was cold; the wind was blowing.

Q. A cold, windy night? 411

A. Yes, sir.

Q. There was a fire kept in the pump house
for the purpose of keeping it warm?

A. Yes, sir.

Q. And you left the outside door open when
you entered?

A. Yes, sir.

Q. Did you have some purpose in doing that? 412

A. No, sir.

Q. About how far did you leave it open?

A. Six inches.

Q. Did you know, at the time you left it open,
about how far you left it open?

A. No, but I usually left it open about six
inches.

W. M. Collins, re-called for Pltf., Cross.

413 Q. So that it was the usual thing for you to leave it open when you entered the pump house?

A. I couldn't say it was.

Q. Didn't you say you usually left it open about six inches?

A. As I remember it that night, it was open about six inches.

Q. That is you left it open about six inches?

414 A. Yes, sir.

Q. When you came to it it was closed?

A. Yes, sir.

Q. And you intentionally left it open about six inches, didn't you?

A. Yes, sir.

Q. On every other occasion when you entered the pump house you left it open about six inches, didn't you?

415 A. I can't say that I did.

Q. Will you say you didn't?

A. No, sir; I don't know how I left it.

Q. Every other time that you entered there you left it open a considerable ways?

A. I can't say I did.

Q. Will you swear you didn't?

A. No.

416 Q. Didn't you usually leave it open about six inches?

A. I never paid any attention how far I left it open.

Q. Without paying any attention to it—just looking back now—didn't you usually leave it open about six inches?

A. I can't say how far I left it open.

W. M. Collins re-called for Plf., Cross.

Q. Didn't you testify a minute ago, that you 417
knew you left it open on the night of the accident
about six inches because you usually left it open
about six inches?

A. I left it open this night for a particular
reason.

Q. Will you answer the question? Didn't you
testify just a minute ago that you usually left it
open about six inches? 418

A. I did in case of somebody calling you in
the tower—

Q. Listen to the question. Did you then
usually leave it open about six inches?

A. I can't say I did; no, sir.

Q. Didn't you swear to that a minute ago—
that you did usually leave it open about six
inches? 419

A. I said I did; yes, sir.

Q. Is it true that you did?

A. I left it open that night about six inches.

Q. Is it true, as you testified, that you usually
left it open about six inches?

A. Yes, sir, it is.

Q. It took a long time to get that, didn't it?

A. Yes.

Q. Why were you so reluctant to admit that? 420

A. I don't know.

Q. The lantern which you took with you this
night was the same one, or a similar one to the
one you had with you on the preceding night
when you went there with the other employee of
the company?

A. Yes, sir.

W. M. Collins, re-called for Pltf., Cross.

421 Q. That was a lantern enclosed at the top and bottom by a metal construction?

A. Yes, sir.

Q. With a glass globe in between?

A. Yes.

Q. Protecting the flame?

A. Yes.

Q. An ordinary railroad hand lantern?

422 A. Yes, sir.

Q. Do you remember whether it was the same one you had the preceding night, or the night when you went there with the other man to the pump house?

A. I couldn't say whether it was or not.

Q. When you entered the pump house, where did you place the lantern, first?

A. On the pipe.

423 Q. What pipe?

A. The pipe running from the engine.

Q. Do you see the pipe in that photograph?

A. Yes, sir. (shows).

Q. Is that the pipe which we called the water pipe?

A. I don't know if it was a water pipe or not.

424 Q. It is the pipe we referred to as the water pipe, isn't it?

A. Yes, sir.

Q. That is the large pipe running from the pump, horizontally and from which is connected a vertical pipe?

A. Yes, sir.

Q. Will you indicate about where, on that pipe, you placed the lantern when you entered the pump house?

W. M. Collins, re-called for Pltf., Cross.

A. I think it was in that place where that plank is setting now; the plank wasn't there that night. (shows). 425

Q. Will you indicate with a pencil the section of pipe on which you placed your lantern—just mark an "X" on it with a pencil.

A. About there. (Indicates on photo).

Q. Of course the lantern was placed on top of that pipe? 426

A. Yes, sir.

Q. What do you estimate the distance from the near side of the pump, along that pipe, to the point where you set your lantern?

A. I think about two feet or two and a half feet.

Q. You spoke this morning of the concrete base on which the engine rested? 427

A. Yes, sir.

Q. That concrete base is shown in the photograph Plaintiff's Exhibit #2? (shows).

A. Yes, sir.

Q. That concrete base rests on the floor?

A. Yes.

Q. Which is generally level, is it not?

A. Yes.

Q. It was a dirt floor? 428

A. Cinders on the bottom.

Q. The top of the pipe, on which you placed your lantern, is something more than a foot above the floor level, is it not?

A. About that; yes, sir.

Q. The opening through which you poured the gasoline into the cylinder is about five or six inches from the front of the cylinder?

W. M. Collins, re-called for Pltf., Cross.

429 A. About that; yes, sir, I think.

Q. And the water pipe—the pipe which we call the water pipe—the center of it, in its diameter, is about eight or nine inches in front of the cylinder, is it not?

A. I can't say.

Q. I said about that. You see in the photograph the front of the cylinder, do you not?

430 A. Yes, sir.

Q. You see the pipe that we call the water pipe?

A. Yes, sir.

Q. And the center—speaking of it from the standpoint of the diameter—the center of the pipe on the top, is about eight or nine inches in front of the front of the cylinder, is it not?

A. Yes, sir, I think it is.

431 Q. And the opening into which you poured the gasoline into the cylinder is about eighteen inches higher than the top of the water pipe on which you put your lantern, is it not?

A. I can't say.

Q. Is that approximately correct? You see the cylinder and you see the water pipe there?

A. Yes, sir.

432 Q. The opening in the top of the cylinder is about 18 inches above the top of the water pipe, is it not?

A. It seems to me as though it was higher than that.

Q. What do you say?

A. I should judge about two feet, or two and a half.

W. M. Collins, re-called for Plf., Cross.

Q. What was the height of your lantern? 433

A. A foot from the ground, on that pipe.

Q. I mean the lantern itself,—what was the height of it?

A. I don't know the dimensions of it.

Q. Not exactly—about ten inches or a foot?

A. About ten inches.

Q. What I am getting at is this—your lantern, resting on that pipe, was lower—the top of it was lower than the opening into which you were pouring the gasoline, was it not? 434

A. Yes, sir.

Q. About how much lower?

A. I should think a foot lower.

Q. That cylinder into which you were pouring that gasoline is a solid cylinder, is it not—that is, the outside is solid? 435

A. Yes, sir.

Q. So that no direct rays of light from your lantern reached the point into which you were pouring the gasoline?

A. There was light that night where I was pouring the gasoline.

Q. You heard the question?

A. Yes, sir.

Q. Will you answer it? 436

A. There was rays of light there.

Q. Did any direct rays of light come from your lantern—strike from your lantern on this point where you were pouring the gasoline?

A. Yes, sir.

Q. How did they get there?

A. I can't say how they got there.

W. M. Collins, re-called for Pltf., Cross.

- 437 Q. There was a metal top to the lantern?
A. Yes.
Q. No rays of light came through that metal top?
A. No.
Q. The glass part of that lantern was down a couple of feet below that cylinder?
A. About a foot and a half below.
- 438 Q. A foot and a half?
A. Somewhere about there.
Q. And that water pipe was out about nine inches in front of the cylinder?
A. Yes, sir.
Q. And the opening into which you were pouring the gasoline was up on top of the cylinder?
A. Yes, sir.
- 439 Q. Do you say direct rays of light could come from that lantern and strike on the point where you were pouring the gasoline, on top of that cylinder?
A. Yes, sir.
Q. The cylinder itself did not interfere at all with the rays of light from the lantern placed down below?
A. No, sir.
- 440 Q. You understood what I meant when I said direct rays of light from the lantern?
A. Rays of light; yes, sir.
Q. That is it was light about there?
A. It was light where I was pouring the gasoline.
Q. No direct rays of light from this lamp strike you now, do they?

W. M. Collins, re-called for Pltf., Cross.

(Counsel illustrates by placing lantern 441
on table, and holding card before it).

A. No, sir.

Q. Why?

A. Because the paper is in front of it.

Q. Was there anything between that lantern
and the top of this cylinder which obstructed the
direct rays of light from the lantern?

A. No, sir, I don't think there was. 442

Q. On the 19th of January, 1916, you were
still in the hospital at Hornell?

A. Yes, sir.

Q. Do you remember Mr. Durkin, the Erie
claim agent, coming there and taking a statement
from you about the accident?

A. Yes, sir.

Q. And Dr. Charles R. Phelps being there at
the time? 443

A. Yes, sir.

Q. Where were you in the hospital at that
time—what room?

A. I don't remember now where I was.

Q. Weren't you in some—

A. I think in the ward.

Q. In bed?

A. I was sitting up. 444

Q. In a chair?

A. Yes, sir.

Q. Mr. Durkin was there some time wasn't
he?

A. Yes, sir.

Q. He asked you all about this accident?

A. Yes, sir.

W. M. Collins, re-called for Pltf., Cross.

445 Q. You told him some things about it?

A. Yes, sir.

Q. Mr. Durkin wrote out a statement on a sheet of paper, or several sheets?

A. Yes, sir.

Q. About how long was consumed in taking the statement from you?

A. I can't say.

446 Q. An hour?

A. Quite a while.

Q. A long time. Then, after Mr. Durkin wrote out the statement, you read it over?

A. Yes, sir.

Q. Did you suggest to him any changes in it as he had written it?

A. I don't remember—I think I did; yes, sir.

447 Q. Were the changes made at the time—any that you did suggest?

A. I think they were; yes, sir.

Q. Then did you sign the statement?

A. Yes, sir.

Q. With your mark?

A. Yes, sir.

Q. Dr. Phelps signed it as a witness?

A. Yes, sir.

448 Q. And Mr. Durkin?

A. Yes, sir.

Q. And the statement, as you signed it, was correct and true?

A. Yes, sir.

Q. At that time, you told Mr. Durkin, (reads) "Prior to the day of the accident I started to work as an operator at Canaseraga,—Tuesday

W. M. Collins, re-called for Pltf., Cross.

night, December 21st, 1915, and worked every 449
night until the time of the accident, which occurred about 4:00 a. m. December 25th, 1915, during this time I did not have occasion to start the pump, and this particular morning was probably the third or fourth time I had ever had occasion to go into the pump house during the night to start the pump." Did you tell him that?

A. Yes, sir.

Q. Had you, on two or three other occasions, 450
started the pump at night?

A. No, sir, not at this time.

Q. Or any other time?

A. No, sir, not at night; I never started it at night.

Q. What did you mean by the statement, 451
"This particular morning was probably the third or fourth time I ever had occasion to go into the pump house during the night to start the pump"?

A. There was coal in there—the coal in the tower we had to get out of the pump station, and I had to get coal out of there.

Q. Did you say this to Mr. Durkin, (reads) 452
"In order to start this engine it was necessary to prime it, and there is a tin can there with a wire handle on it which I filled full of gasoline?"

A. Yes, sir.

Q. "The way we get that gasoline is by putting the can under the cock on the engine and then using the hand pump on the back of the engine to force the gasoline through?"

A. Yes, sir.

Q. "After I had this can full of gasoline, I

W. M. Collins, re-called for Pltf., Cross.

453 picked it up and went around to the place where I had to prime the engine?"

A. I walked around—stepped to one side.

Q. "I started pouring a part of the can of gasoline into the cylinder, and my lantern was on the water pipe, close by, and in some manner a little of the gasoline dropped on the lantern and an explosion followed?"

454 A. Yes, sir.

Q. You told him that?

A. Yes, sir.

Q. "The burning gasoline flew up into my face and over my clothes?"

A. Yes, sir.

Q. Did you say to him, "The accident was merely caused by the gasoline dripping on the lantern as I was filling the cylinder?" Did you say that to him?

455

A. Yes, sir; I might have at that time.

Q. "The accident was merely caused by the gasoline dripping on the lantern as I was filling the cylinder;" Did you say that to him?

A. Yes, sir.

Q. "At the time I was pouring the gasoline out of the can into the cylinder, the lantern was on the waterpipe I have spoken about." Did you say that?

456

A. Yes, sir.

Q. "It was about three feet away from the point where I was pouring the gasoline into the engine, and some two or three feet lower than this cylinder." Did you say that to him?

A. Yes, sir.

W. M. Collins, re-called for Pltf., Cross.

Q. "So that, as I was pouring this gasoline 457
into the engine some of it struck outside on the
cylinder and spatiered over onto the lantern."
Did you tell him that?

A. Yes, sir.

Q. "The gasoline which I was pouring did not
drop directly onto the lantern." Did you tell him
that?

A. Yes, sir. 458

Q. So that, in the daytime, in 1913, you had
poured gasoline into this cylinder through the
opening which was used on the night of your ac-
cident?

A. That was the first night I used it—

Q. That wasn't my question. You had poured
gasoline into this opening in the cylinder in the
daytime a number of times?

A. Yes, sir. 459

Q. Before the accident?

Q. From a can similar to the one which you
had on the night of the accident?

A. Yes, sir.

Q. So that, on the night of the accident, when
you undertook to pour the gasoline in, you had
knowledge of the diameter of the hole or opening
into which you were to pour the gasoline? 460

A. Yes, sir.

Q. And you knew, by experience, about what
you could accomplish in pouring the gasoline
from the can into that opening, did you not?

A. Yes, sir.

Q. And you knew whether it was easy or dif-
ficult didn't, you?

W. M. Collins, re-called for Pltf., Cross.

461 A. Yes, sir.

Q. You knew, before the night of the accident, whether or not you could likely pour gasoline from the can into this opening without spattering or spilling it, did you not?

A. Yes, sir.

462 Q. And you knew, before the night of the accident, that if the gasoline in the stream from the can struck on the metal side of this opening, that it would spatter, did you not?

A. I never paid any particular attention to that.

Q. You didn't have to pay particular attention to that to know it, did you?

A. No, sir.

463 Q. You know, if you are trying, to pour a stream from one receptacle to another—

A. Yes, sir.

Q. And the stream strikes onto the edge of the entering receptacle, or the article into which you are pouring it, it is going to spatter?

A. Yes, sir.

Q. Everybody knows that?

A. Yes, sir.

464 Q. So that you knew, on the night of the accident, that if the stream of gasoline did not go into the opening—if it struck on the side of it, that it would spatter, did you not?

A. Yes, sir.

Q. And you say it did spatter?

A. I think some of it spattered on the lantern.

Q. And caused the accident?

A. I can't say that caused it—I can't say that was the cause of it.

W. M. Collins, re-called for Pltf., Cross.

Q. That is what you said in the statement,— 465
that some of it spattered on the lantern?

A. Yes, sir.

Q. And some did spatter on the lantern,
didn't it?

A. I think it did.

Q. On other occasions when you had under-
taken to pour gasoline from the can into the
cylinder, had you spilled any of it outside of the 466
cylinder?

A. I don't remember.

Q. What do you think about it? What did you
do before—had you spilled it, or had it gone into
the cylinder on other occasions?

Mr. Ward: I submit that the question was
answered.

The Court: Overruled; he may answer. 467

A. I couldn't say whether it spilled or not; I
don't remember now.

Q. Do you ever recall, before, that the gaso-
line as you poured it in there, spattered?

A. No, sir.

Q. So that, as far as you remember now, on
every other occasion you had been able to pour
the gasoline from the can provided into the open-
ing in the cylinder without spilling or spattering 468
any of it?

A. I can't remember.

Q. I said, as far as you can remember, you
never spilled or spattered any of it?

A. Not that I remember.

Q. And you say, on this night, that you had
light direct on this opening in the cylinder?

W. M. Collins, re-called for Pltf., Cross.

469 A. Yes, sir.

Q. So that if you had light direct on the opening, you could see the opening, couldn't you?

A. Yes, sir.

Q. And you are sure now that you had direct rays of light right on that opening while you were doing that work?

A. Yes, sir.

470 Q. You say that before the time of your accident, you knew if a flame was brought into contact with gasoline, that the gasoline would ignite, did you not?

A. Yes, sir.

Q. So that you knew, on that night, before that accident, that if the drops of gasoline came into contact with the flame in your lantern, that the gasoline would be ignited, did you not?

471 A. No, sir, I didn't.

Q. What's that?

A. No, sir.

Q. Did you think there was any difference between the flame in the lantern and any other flame?

A. I didn't know there was any particular difference.

472 Q. Did you think you could sprinkle gasoline on that lantern that night and not have it ignite?

A. No, sir; no, sir.

Q. You knew, if gasoline was sprinkled on that lantern, it would ignite, didn't you?

A. No, sir.

Q. You did not know that?

A. No, sir.

W. M. Collins, re-called for Pltf., Cross.

Q. Do you mean to say you thought you could 473
sprinkle gasoline on that lantern and not have
it ignite?

A. I didn't know it would ignite.

Q. What was your idea about it?

A. I didn't know what it would do.

Q. Did you have any idea then that you could
bring the gasoline into contact with the flame in
that lantern and not have it ignite?

474

A. I didn't know,—

Mr. Ward: I object to it; he is asking
about sprinkling gasoline on the lantern,
and now he is asking about the flame.

The Court: Objection overruled.

Q. Did you have an idea that you could sprin-
kle gasoline on the flame of your lantern and it
would not ignite?

475

A. No, sir.

Q. What did you think about it?

A. I didn't know what it would do.

Q. You didn't know, that if you had an open
flame, and sprinkled gasoline on it, whether it
would ignite or not?

A. No, sir.

Q. You didn't have any thought on the sub-
ject at all?

476

A. No.

Q. 21 years old, and a student in high school
for three years?

A. I never had any experience with gasoline.

Q. Did you have any experience with dyna-
mite?

A. No, sir.

W. M. Collins, re-called for Pltf., Cross.

477 Q. What's that?

A. I have been around where they were blowing up stumps; yes, sir.

Q. And you have been around where a gasoline engine was operated by gasoline?

A. Only this place.

Q. But you never had any experience with dynamite, did you?

478 A. Yes, sir.

Q. In handling it?

A. Yes, sir.

Q. In exploding it?

A. No, sir.

Q. Do you mean—you say handling it—you mean carrying it?

A. No, sir.

Q. How?

479 A. I was working with a fellow when he was blowing up stumps.

Q. Was that before the accident?

A. Yes, sir.

Q. So that you knew there was some explosive force in this world?

A. Yes, sir.

480 Q. But you say you did not know gasoline was one of them?

A. No, sir.

Q. Did you ever hear before that of anybody being burned by gasoline?

A. Yes, sir, I had heard about it.

Q. Then you knew gasoline was inflammable, did you not?

A. I knew that you had to be careful with it—that people using it had to be careful with it.

W. M. Collins, re-called for Pltf., Cross.

Q. Had to be careful—why? 481

A. I didn't know why; I have heard of people getting burned with it.

Q. You say you knew that a person had to be careful in using it; if you knew they had to be careful in using it, you must have known why they had to be careful, didn't you?

A. No, sir, I did not.

Q. You never knew, before the accident, why a person had to handle gasoline with care; is that right? 482

A. No, sir.

Q. Still you had heard of persons being burned by explosions of gasoline?

A. Yes, sir.

Q. Before your accident?

A. Yes, sir.

Q. Who was the man that went with you when you started the gasoline engine two or three nights before the accident? 483

A. Robert Pinkney.

Q. The method which Pinkney outlined to you for starting the engine was the same method which you had used in 1913?

A. Yes, sir.

Q. Are those the five pages of the statement which you signed, Mr. Collins? 484

(Witness shown papers).

A. Yes, sir.

Mr. Ryan I ask to have them marked for identification.

Papers marked Defendant's Exhibits #5 to #9, inclusive, for identification, only.

W. M. Collins, re-called for Pltf., Cross.

485 Q. How did you get into the pump house on the night of the accident, Mr. Collins?

A. Through the door.

Q. How did you get the door open?

A. Just turned the knob on the door.

Q. So that the catch wasn't on at the time you entered?

A. No, sir.

486 Q. The lock, you think, was sprung by the explosion?

A. Yes, sir.

Q. About what part of the can did you fill with gasoline—about how full was the can with gasoline on the night of the accident?

A. I think nearly full.

487 Q. This container, which we have here, you estimate would hold about how much? (Shows).

A. I should think about a pint.

Q. Do you think it would hold a pint?

A. One-half pint.

Q. After filling the container with gasoline from the cock did you step directly with it to the cylinder?

A. Stepped one step to one side.

488 Q. You picked up the pail as soon as it was nearly full of gasoline?

A. Yes, sir.

Q. When you picked up the pail, you shut off the little cock from which it was running?

A. Yes, sir.

Q. As soon as you picked up the little pail of gasoline, you took one or two steps over to the place—

W. M. Collins, re-called for Pltf., Cross.

A. I stepped to one side to get around the end of the cylinder. 489

Q. Two, three or four steps?

A. Probably stepped six inches to one side.

Q. Then you immediately began pouring it into the cylinder?

A. Yes, sir.

Q. About what part of it had you poured in when the explosion occurred? 490

A. I couldn't say.

Q. One-half of it, or what?

A. About one-half of it.

Q. About as much as you intended pouring into the cylinder?

A. Yes, sir.

Q. But you were still pouring it into the cylinder when the explosion occurred? 491

A. Yes, sir.

Mr. Ryan: That is all.

(Short recess taken here).

Mr. Ryan, resuming:

Q. Just another question or two. Mr. Collins, the water which was pumped into the tank was pumped by the engine from the earth—pumped out of the earth? 492

A. I don't know where it came from.

Q. Didn't you say there was a well there?

A. Yes, sir, there was a well there.

Q. Located at some place nearby there?

A. Yes, sir.

Q. How far from the pump house?

A. I couldn't say; I never knew where the well was.

W. M. Collins, re-called for Pltf., Re-direct.

493 Q. It was in the ground somewhere?

A. Yes, sir.

Q. And the pump in the pump house pumped the water from that well into the tank?

A. Yes, sir.

Q. Then the water flowed by gravity from the water tank into the tenders of the locomotives?

A. Yes, sir.

494 Q. The distance from the front of the cylinder head,—where you were pouring the gasoline,—to the entrance door—the door by which you entered, is about four feet, isn't it?

A. I think it is farther than that; possibly six feet.

Q. Possibly six feet?

A. Yes, sir.

Mr. Ryan: That is all.

495

RE-DIRECT EXAMINATION by Mr. Ward:

Q. Collins, I suppose you knew more about gasoline since the accident than you did before?

A. I certainly have.

Q. After you got burned there, did you give considerable thought and ask questions to find out how this happened?

496 A. Yes, sir, I did.

Q. When you made this statement to the claim agent, in January—in Hornell, was that?

A. Yes, sir.

Q. Did he write it out?

A. Yes, sir.

Q. Was that language there—did you dictate it, or did he talk with you and write it down in his language?

V. M. Collins, re-called for Pltf., Re-direct.

A. He asked me questions and I answered 497
them.

Q. When you said to him there, as you testified in answer to Mr. Ryan's question, that the gasoline sprinkled or spattered on the lantern, did you know it spattered on the lantern, or is that the way you figured it out?

A. I figured it out—I couldn't see any other way but that it spattered on the lantern, or I spilled some of it; I didn't know the danger of gasoline— 498

Q. At the time you were pouring the gasoline, did you know or see it spattering on the lantern?

A. No, sir.

Q. How did you come to tell the claim agent that it had spattered on the lantern?

A. I had it figured out, that was the only way it could explode,—by the gasoline spattering on the lantern. 499

Q. Did you intend to sprinkle any gasoline on the lantern?

A. No, sir.

Q. As you were pouring there, were you aware that any was spattering on the lantern?

A. No, sir.

Q. Do you know at what temperature gasoline volatilizes? 500

A. No, sir, I don't.

Q. Did you then know, or do you now, whether gasoline fumes rise or sink?

A. No, sir, I didn't know then.

Q. Have you learned since? You don't need to tell us what you know.

W. M. Collins, re-called for Pltf., Re-direct.

501 A. I can't say that I do know now.

Q. Did you know at the time of the accident that gasoline when raised to a certain temperature turns into vapor?

A. No, sir.

Q. Did you know then whether the gasoline in the cylinder explodes before it vaporizes, or afterwards?

502 A. No, sir.

Q. Did the lantern that you were handling there, or that you had there—did that, at any time, come in contact with the gasoline you were pouring, or that was in the cup?

A. No, sir, it did not.

Q. Was this lantern entirely covered, except for the perforations in the metal portion of the bottom?

503 A. Yes, sir; there was a metal top over it.

Q. Was there some place there where it was open at the top,—between the metal top and the glass—is there an opening there for the heat to come out?

A. On the side, yes, sir; little openings.

Q. Had you observed any flash or spluttering of the drops of gasoline on the lantern before the main explosion took place?

504

A. No, sir.

Q. Where did you get the thought from that the drops of gasoline must have splattered on the lantern?

Mr. Ryan: I object to it as incompetent, immaterial, irrelevant, improper and hearsay.

W. M. Collins, re-called for Pltf., Re-direct.

Mr. Ward: It is only offered in explanation of the statement written in positive language, that it splattered; I will withdraw the question. 505

Q. Was that discussed at the time the claim agent was at the hospital? What is his name?

A. Durkin.

Q. The one that wrote that statement out?

A. Yes, sir. 506

Q. Did you and he talk over every way that could have caused it?

A. No, sir, we did not.

Q. You did not get that idea from him?

A. No, sir.

Q. You had that idea or thought?

A. Yes, sir.

Mr. Ryan: I object to it as incompetent, immaterial, irrelevant and hearsay. 507

The Court: The fact whether he got it from others or not, he can answer "yes" or "no," and determine the question whether he got it from his own mind or not.

Mr. Ryan: Did your Honor exclude the question?

The Court: I think I will exclude the question. 508

Mr. Ryan: I move to strike out the answer.

The Court: Strike it out.

Q. Did you intentionally sprinkle any gasoline so as to have it come in contact with that lantern?

A. No, sir.

F. S. Hoffman, for Pltff., Direct.

509 Q. At the time you were pouring it did you have any idea that was happening, or that you were doing it?

A. No, sir, I did not.

Q. Did you know that a drop of gasoline, if it came in contact with the globe of the lantern, might explode?

A. No, sir.

510 Q. Did you know that the degree of heat at which a drop of gasoline would explode could be found in the lantern globe—whether it was sufficient?

A. No, sir.

Q. Did you know whether or not a drop of gasoline could explode without coming in direct contact with flame or spark?

A. No, sir.

511 Q. Mr. Ryan asked you this morning if you knew where petroleum came from. Do you know where oil comes from?

A. Yes, sir.

Q. Do you know the proper name of oil is petroleum?

A. I didn't know at the time—if I knew it is considered as oil, I would know.

512 Mr. Ward: That is all.

FRED S. HOFFMAN, being duly sworn as a witness for plaintiff, testified as follows:

Direct Examination by Mr. Ward:

Q. Dr. Hoffman, you are a physician^e and surgeon?

F. S. Hoffman, for Pltf., Direct.

A. Yes, sir.

513

Q. You have practiced your profession here how many years?

A. 23 years.

Q. You have had quite a large surgical experience?

A. Moderate; yes, sir.

Q. And see a good many cases of burns?

A. Yes, sir.

514

Q. You examined this young man recently?

A. Yes, sir.

Q. Will you be kind enough to state to his Honor and the jury the condition he is in so far as burns and traces of burns are concerned?

The Court: When was the examination made, doctor?

A. Within three or four days. I first examined his hands, and found that on each hand and wrist, on the radial side,—the thumb side—there was a burned area involving the thumb and a portion of the hand immediately above it and extending to the wrist; it was covered with scar tissue, and that on the right hand the scar tissue was more in extent—deeper—the burn had been deeper, enough so that the whole of the thumb is covered with scar tissue, and a little contraction has taken place; this contraction has been and will take place in the right thumb; it is drawing the soft parts from the nail, and limiting the closing of the right hand—the flexing of the right hand. The left one is not so badly burned, and the contraction is not so strong, and not taking place to the same extent. I examined, by inspection

515

516

F. S. Hoffman, for Pltf., Direct.

- 517 tion, his face, and saw a scar extending from about the hair line on one side of the face, down that side and underneath the chin, and up the other side to about the hair line. On the right side I found an absence of the right ear—the auricle of the right ear; just below the auditor canal, on the right side,—that is the canal entering the ear,—there is a blind pocket about one-half inch
- 518 deep, containing the products of desquamation—foul material. Upon examining the ear proper—the auditory canal—I found scar tissue extending into the external auditory canal nearly to the drum of the ear; the drum of the ear is inflamed slightly, and the auditory canal lined with similar scar tissue that is on the outside on the face; the scars here are of the same character as on the right thumb; the vigor of the burn was sufficient
- 519 to allow so much formation of scar tissue, the face is beginning to draw parts one way and another. Following these scars under the chin, there are bands of scar tissue going from the point of the cheek to the neck, and they are also beginning to contract and close up and prevent the raising of the chin. Extending up the left side of the face to the left ear there are similar
- 520 wounds to the left auricle, and back and below the left ear there are bands of adhesions which are beginning to contract—they are contracting now and will continue to do so. Below the auditory canal on this side, there is also a small blind pocket about one-half inch deep, but not so large as the other. The lining of the auditory canal on the left-hand side is normal,—not burned. Of

F. S. Hoffman, for Pltf., Direct.

course there is an absence of hair follicles over 521
the whole of the burned area; there is no hair
present; the covering of the scars is such as we
find covering scars resulting from burns.

Q. Burns are commonly divided into three degrees?

A. Different authors use all kinds of degrees,
but three degrees are sufficient for the general
understanding of burns,—first, second and third 522
degrees.

Q. What is a first degree burn?

A. Simple reddening, without blistering.

Q. The second?

A. Admission of a bleb or blister, with water
inside.

Q. Third?

A. Destruction of the skin.

Q. What was the extent of the burning that 523
you have described on this man's face and
hands?

A. Third degree; the skin removed entirely.

Q. What is the scar tissue that takes the place
of the skin?

A. A fibrous growing tissue; it has all of the
qualities of the skin absent except the epidermis,
—that is the outside layer, which is similar to the 524
ordinary skin, but the sweat glands, oil glands,
hair follicles, and the elasticity to which the skin
is permissible, are all gone; it is a fibrous tissue
covered with alphas; the only quality of the skin
is that it covers up the parts underneath.

Q. This contracting that you observed and
described in the right hand, has that gone to the
extent it will go, or will it continue further?

F. S. Hoffman, for Pltf., Direct.

525 A. It will continue even so far that some hold that scar tissue never ceases to contract; that is going a long ways, but it has not finished here, surely.

Q. What effect will that have on the use of his hand?

526 A. Outside of the closing and flexing of the thumb, it looks as if he would evidently have trouble by the drawing of the flesh away from the nail, and lay bare the end of the nail.

Q. What do you prognose in reference to his face?

A. The contraction.?

Q. Yes.

527 A. It will contract—scar tissue always contracts. Another thing, the principal function of the skin on the body is that of protection, and as applied to this scar tissue, that function is largely removed; it will irritate frequently, and if scratched or cut it will heal slowly, and loses a great deal of the nature which the skin is made for.

Q. What about its being affected by heat and cold?

528 A. It won't stand irritation from cold; I do not imagine that heat, unless it was excessive, would affect it much; ordinary heat will be grateful to it; cold on the skin causes the blood to warm it—if we work in the cold our faces get red by nature furnishing additional blood to counteract the cold effect, but that cannot happen here, and the fact of its not happening the face will suffer as the result of the cold; warmth,

W. F. Jeffries, for Pltf., Direct.

unless it is excessive, will not affect it, but if 529
working in a hot place, the same thing would hap-
pen there.

Q. Will this red appearance of his face ever
be erased?

A. No, sir, no change to it.

Q. Does the condition of his left ear impai
his hearing?

A. Yes, sir, for two reasons; he has less 530
trumpeting effect in his ear; our ears are there
to gather sound, and that is gone; and the lining
of the auditory canal is scar tissue; I do not sup-
pose that will have a whole lot to do with his
hearing; I presume the principal difficulty or im-
pairment of hearing on the right side will be the
loss of the gathering function of noise or sound
waves.

Mr. Ward: That is all, doctor. 531

Mr. Ryan: That is all; no cross exami-
nation.

WILLIAM F. JEFFRIES, being duly sworn
as a witness for plaintiff, testified as follows:

532

Direct Examination by Mr. Ward:

Q. Mr. Jeffries, what is your business?

A. Telegraph operator, at the present time
for the Erie, in C. S. tower, Buffalo Division.

Q. Where is that tower located?

A. About a mile west of Canaseraga sta-
tion.

W. F. Jeffries, for Pltf., Direct.

533 Q. That is the tower where Mr. Collins got hurt?

A. Yes, sir.

Q. You have been at that tower how many years?

A. 49 years—that is 49 years at Canaseraga, in the employ of the company, but about 15 years at that tower.

534 Q. How long has that tower been there?

A. About 15 years, I think.

Q. How long has that gasoline engine been there?

A. It must have been there about 12 years, I think. I am merely guessing; I don't know for certain.

Q. You are a day man there?

535 A. Yes, sir; from 7:00 o'clock in the morning until 3:00 o'clock in the afternoon.

Q. Were you also day man there during the brief intervals when Collins worked there?

A. Yes, sir.

Q. Is the day man in charge of the other men, Mr. Jeffries?

A. In a way, he is supposed to be the manager.

536 Q. And lays out the work?

A. No; he simply keeps track and sees things are going properly, and takes care of all the loadings on the team and the cripple tracks each of there—cars switched there for repairs, etc.

Q. Do you remember the first time Mr. Collins came there to work, when he worked there ten days?

A. No, sir.

W. F. Jeffries, for Pltf., Direct.

Q. You do not recall that? 537

A. No, sir; there are so many of those men that I couldn't keep track of them all.

Q. Do you recall when he came there to work on the 21st of December, just before the accident?

A. Well, slightly.

Q. Did you give him any instructions about the operation of that engine? 538

A. I don't know that I did.

Q. Do you know of anybody else doing it?

A. It is rutable for the man—

Mr. Ryan: I object to it as hearsay.

Q. Do you know of anybody else doing it?

A. I do not.

Q. Did you operate it yourself, sometimes?

A. I have pumped every day, when it was necessary. 539

Q. Did you ever use the pump at night?

A. Yes, sir.

Q. When you went in there at night to handle it, what kind of light did you use?

A. Used a lamp called an "Inspector's lamp."

Q. What is that—

A. It is something like a lantern, only there was a reflector inside, and throws the light one way; it is more powerful than an ordinary barn lantern. There was one supposed to be in there; whether it was in there that night or not I don't know. 540

Q. How long before the accident did you see that inspector's lamp anywhere about?

W. F. Jeffries, for Pltf., Direct.

541 A. I saw it sometimes in there, and sometimes in the tower; the night men had it, naturally, and sometimes they left it in the tower, and sometimes in the engine house.

Q. Do you know whether that lamp was available during the time Mr. Collins was there?

A. I don't know.

542 Q. All the lamps there were furnished by the railroad company?

A. Yes, sir.

Q. When you went to the tower nights, as I understand it, you had sometimes this inspector's lamp and sometimes an ordinary lamp?

A. Yes, sir.

Q. You sat here this morning when Mr. Collins was telling how he took the gasoline out of the cylinder and poured it in the little hole?

543 A. Yes, sir.

Q. Is that the way you did it?

A. Yes, sir.

Q. Was there any other way of starting this engine except that?

A. Yes, sir.

Q. How?

544 A. There is a little steel cone, about as large as your little finger, pointed at the top and bottom, that screws from the outside surface of the cylinder down inside, and there is a little vessel that holds about a quart—a copper vessel—suspended from a beam, up about six inches, and a small hollow wire that comes down; that hollow wire is filled with a wick, like a lamp; there is a long cone about that long, (shows) and a little

W. F. Jeffries, for Pltf., Direct.

wheel; you let a little spray there, and that spray 545
heats the cone red hot; when it is red hot, you
work the same system that he told you about, and
it works the engine without any battery.

Q. Did you have to go through the prelimi-
naries with that system, of pouring the gasoline,
etc.?

A. Yes, sir, the priming, and shoving in the
match, and the whole business. 546

Q. You had to prime it the same way?

A. Yes, sir.

Q. Only the difference that you described is
intended to take the place of the battery?

A. If the battery fails, you have a substitute.

Q. During the 12 years that has been going
on, has it been the custom to pour the gasoline—

A. Always primed it; those are the instruc- 547
tions from the makers.

Q. Was there any funnel there?

A. Yes, sir, and used part of the time—some
part of the time a little funnel was used, but I
never used it.

Q. Was there a funnel there when Collins was
there?

A. I don't know.

Q. You did not see any there at the time? 548

A. I don't remember whether there was one
there or not.

Q. Did you ever have a can, with a spout, to
pour the gasoline out of, so that it wouldn't spat-
ter?

A. No, sir, just a little cup, I think—it was a
pint paint cup, with the edges bent; that is the
cup over there. (Shows).

W. F. Jeffries, for Pltff., Direct.

549 Q. That is the one that is here?

A. Yes, sir; I sent it up here. I put that handle on it.

Q. You furnished that?

A. Yes, sir.

Q. For how many years has that been all they had in that tower?

550 A. It might not have been the same one, but one similar to that.

Q. Do you know—in all the years you have handled this—do you know the temperature at which gasoline volatilizes?

A. No, sir.

Mr. Ryan: Objected to as incompetent, immaterial and irrelevant.

The Court: He said he don't know; it may stand.

551 A. I don't know just the temperature.

Q. This picture here, Plaintiff's Exhibit #2—which Mr. Ryan has so kindly produced and allowed me to use—shows a lantern hung on the wall of this pump house?

(Witness shown picture).

A. Yes, sir.

552 Q. Was there any such lantern there as that at the time Collins was hurt?

A. I couldn't say as to that; sometimes it was on this side, and sometimes on the other side.

Q. Sometimes there wasn't any there?

A. Sometimes near the door. It might have been the lantern they took in there.

Q. Was there any lantern, at that time, regularly placed in this house?

W. F. Jeffries, for Pltf., Direct.

Mr. Ryan: I object to that.

553

The Court: Overruled.

Q. Answer.

A. I don't know.

Q. You don't know?

A. No. The night men handled it to suit themselves, and half the time I didn't know where it was.

Q. Did you give any orders to the night men on the subject of how they should handle that engine? How to light—

554

A. I don't remember.

Q. Or how to start it?

A. No, sir. When there was a man to break in, I broke them in.

Q. You didn't break in Collins?

A. No.

555

Q. Do you know where the man is that broke in Collins,—Mr. Pinkney?

A. He is second trick operator at Portage tower, Buffalo Division of the Erie Railroad.

Q. Still working for the Erie Railroad?

A. The last I knew; yes, sir.

Mr. Ryan: I move to strike out the statement that Pinkney broke in the plaintiff; the testimony is that he operated the engine according to this method a year before he saw Pinkney.

556

The Court: If there is any question about it, I think that particular remark should go out.

Mr. Ward: Very well.

Q. Do you know the horse power of this engine?

W. F. Jeffries, for Pltf., Direct.

557 A. Fifteen.

Q. Did you have any general orders from the Erie Railroad Company to explain to these telegraph operators that had to run this engine, anything about these uses and abuses of gasoline?

A. No, sir.

Q. Who kept the gasoline there?

558 A. I don't know who furnished it—it was ordered; I notified them as to the amount on hand, and the probability as to how long it would last, and it came and was unloaded by way freight.

Q. Do you know what kind of gasoline was being used at the time of the accident?

A. I don't know.

559 Q. Had you had any experience yourself with gasoline engines or used any gasoline, except at that tower?

A. No, sir.

Q. So that all you knew about it—

A. I got ~~by~~ experience.

560 Q. Did they ever send any engineer—I mean before the accident,—did they ever send any engineer or man familiar with gasoline and the operations of gasoline engines there to instruct you or the other tower men?

Mr. Ryan: I object to it as incompetent, immaterial, irrelevant, improper and not within the issues; not confined to the plaintiff.

The Court: Do you press it, Mr. Ward?

Mr. Ward: I will confine it to the plaintiff.

W. F. Jeffries, for Pltf., Direct.

Q. During the time Mr. Collins was there, was 561
there ever anybody sent there to instruct Collins,
or the rest of you, about how to operate the gaso-
line engine, or the uses and abuses of gasoline?

A. Not that I know of; not to my knowledge;
nobody ever presented to me.

Q. Do you know, Mr. Jeffries, that gasoline
when it is turned into gas—when it volatilizes—
do you know whether it rises or sinks? 562

Mr. Ryan: I object to it.

The Court: He asked if he knows, he
may answer that.

Q. Do you know?

A. I personally knew—I will tell you—

Mr. Ryan: That answers the question.

A. Yes, sir.

Q. You knew whether the fumes rise or sink? 563

A. Yes, sir.

Q. Did you ever tell Collins?

A. No; because I found out since he was
hurt.

Q. You didn't know at the time he was hurt?

A. No, sir.

Q. Do you know whether, in the operation of
that engine—whether the gasoline volatilizes,—
is turned into gas, before it is exploded? 564

A. Yes, sir.

Q. Or did the gasoline explode, and turn into
gas, and then the gas explode?

A. I think it must turn into gas before it ex-
plodes.

Q. You knew that?

A. Yes.

W. F. Jeffries, for Pltff., Direct.

565 Q. Did you ever tell that to Collins?

A. No, sir.

Mr. Ryan: That is objected to as incompetent, immaterial, irrelevant, improper and not within the issues of the complaint; there is no claim here that the gas in the cylinder was exploded.

566 The Court: I will overrule the objection.

Mr. Ryan: Exception.

Q. Did you know that a drop of gasoline, if it was dropped on the globe or top of the lantern—did you know whether or not that would turn into gas?

Mr. Ryan: Objected to as incompetent, irrelevant, immaterial and improper.

567 The Court: I think, if you are going into the technical part of it, and desire to pursue the examination, you should qualify the witness.

Mr. Ward: I simply desire to prove there was no instruction given this man, or Mr. Collins, or the other men there.

568 The Court: You may ask him about the instructions given, but your question is technical; I have allowed the rest of it, but I think you are going too far with it.

Mr. Ryan: I move to strike out the answer that gasoline fumes fall, because he said it was hearsay, and something that he learned since the accident.

The Court: He said he knew it; he did not say whether from experiment or being told.

W. F. Jeffries, for Pltf., Direct.

Mr. Ryan: He said he learned it since 569
the accident.

Mr. Ward: What he learned since the
accident may be stricken out.

The Court: Strike it out.

Q. There was a stove in there, wasn't there?

A. Yes, sir.

Q. Have you ever noticed anything, in connec- 570
tion with that stove, when it was burning, and
gasoline was spilled there—any gasoline fumes,
and what they did to the stove,—before the acci-
dent?

Mr. Ryan: Objected to as incompetent,
immaterial, irrelevant, improper and in-
definite.

The Court: If he can answer, he may.

Mr. Ryan: Exception.

A. I was priming that hole on top of the cylin- 571
der one day when one of the workmen came in
and opened the stove door to warm his hands,
and immediately there was a shot of fire came out
of the stove at about that degree, and blew the
can out of my hand, and went off and had a little
explosion in that hole; that was the way I knew.

Mr. Ryan: I object to it on the grounds 572
stated, and also on the ground that the
conditions were not the same as on the
night of the accident,—at the time the wit-
ness has mentioned.

The Court:

Q. When was that? Was that before the ac-
cident?

A. After: that same winter.

F. D. Jackson, for Pltf., Direct.

573 Q. That same winter?

A. Yes, sir.

The Court: After the accident? Strike it out.

Mr. Ward:

Q. Did you ever notice anything of that sort before the accident?

A. No, sir.

574 Q. Did you know, before the accident, that gasoline fumes could ignite either from a lantern or from a stove?

A. Yes, sir.

Q. You knew that before the accident?

A. Yes, sir.

Q. Did you ever tell Collins that?

A. No.

575 Q. Do you know of anybody else that ever gave him that information?

A. I didn't; I don't know who posted him; I suppose it was Pinkney, but I am not positive of that.

Q. You were not there the night he got hurt?

A. No, sir.

Mr. Ward: That is all.

Mr. Ryan: No cross examination.

576

FRANK D. JACKSON, being duly sworn as a witness for plaintiff, testified as follows:

Direct Examination by Mr. Ward:

Q. Mr. Jackson, what is your business?

A. Assistant engineer, in city engineer's office.

F. D. Jackson, for Pltf., Direct.

Q. Have you had experience with various kinds of engines? 577

A. Yes, sir.

Q. Gasoline engines?

A. Yes, sir.

The Court:

Q. Here in Buffalo?

A. Yes, sir.

Q. Assistant city engineer? 578

A. Yes, sir.

Q. For the City of Buffalo?

A. Yes, sir, for the City of Buffalo.

Mr. Ward:

Q. Are you familiar with gasoline engines?

A. Yes, sir.

Q. And have been a good many years? 579

A. Practically so; yes, sir.

Q. Are you familiar with experiments and the study of the qualities and operation of gasoline?

A. Yes, sir.

Q. What is gasoline?

A. It is similar to marsh gas; it is a carbon and hydrogen mixed.

Q. What does it come from?

A. Crude oil,—petroleum—as it is being refined. 580

Q. Will you explain the explosive and inflammable qualities of gasoline?

A. I can state an experiment. If gasoline is put in an ordinary glass, and a lighted match is placed over the tumbler or glass, there will be a flame within a certain distance of the top of the glass, but not right at the top of the glass. If

F. D. Jackson, for Pltff., Direct.

581 you take a lighted match and attach a wire to it, and lower it into the glass, your match will go out; in other words, a certain percentage of oxygen must be in the air to combine with the carbon and hydrogen to produce the flame, and when it is properly mixed, and a flame is touched to it, it will explode.

Q. So that, if you touch a match to gasoline in
582 a tumbler will it explode?

A. No, sir.

Q. Tell us why it won't explode?

A. Only with one exception—that it evaporates fast enough so that the right proportion of oxygen will be mixed with it to allow it to explode, and if it is in a tumbler, it does not evaporate fast enough if you produce the flame over it.

583 Q. What is it that explodes in the cylinders of gasoline engines,—the gasoline itself, or the gas that volatilizes from the gasoline?

A. It is the volatilized gasoline mixed with the proper proportion of oxygen and hydrogen.

Q. Is the mixture of hydrogen and oxygen necessary to produce an explosion?

A. Yes, sir.

584 Q. Does gasoline, in being poured and spattered around—does that tend to volatilize it?

A. Yes, sir.

Q. What do you call that? Fumes of gasoline?

A. Yes, sir.

Q. Where these fumes of gasoline so volatilize are they explosive?

F. D. Jackson, for Pltff., Direct.

A. They are.

585

Q. How do they become explosive?

A. Simply by turning in the gas, and the proper amount of oxygen combining with the volatilized gasoline.

Q. What is it that explodes the fumes of gasoline? Suppose I have this full of gasoline, (shows) and I pour it on the table, and it spatters on the floor, and the fumes arise—do the fumes go up or stay down? 586

A. Down.

Q. Why?

A. They are heavier than air.

Q. Supposing those fumes then come in contact with a light—a stove or lighted lantern, then what?

A. It may produce fire, or may produce an explosion. 587

Q. Will you explain it more fully; why is it sometimes fire, and why sometimes an explosion?

A. If there is not enough oxygen mixed with it it produces a flame—if the volatilized gasoline is rich,—not enough oxygen with it, it will produce a flame, but if the proportion is right, it will produce an explosion. 588

Q. Supposing you have a closed room, the size of that jury box, and you have gasoline fumes in that room,—the room heated with artificial heat in the winter time—if you have gasoline fumes in that room, is the tendency of those gasoline fumes to explode increased by opening the door?

Mr. Ryan: I object to it as incompetent,

F. D. Jackson, for Pltff., Direct.

589 immaterial, irrelevant and improper; it does not state the conditions as they existed at the time; and on the ground that it is a question for the court and jury and not for expert testimony.

Q. I should not have said opening the door; is the tendency increased by a partially open door into the outer air—a door open six inches?

590 Mr. Ryan: Same objection as before.

The Court: I think there is some objection to it, on the ground that it is a little indefinite; perhaps you can incorporate more of the actual facts as they already appear in the evidence, in a hypothetical question,—if that is what it is.

Mr. Ward: I will withdraw the question.

591 Q. Assuming that gasoline is being poured in a warm room, and that gasoline is being poured out of a can,—which had previously been pumped into the can through a little pet cock at the end of a cylinder, which has to be forced by a pump, and then that gasoline is taken and slowly poured into a hole in the cylinder, and some of that gasoline doesn't quite hit the hole, but spatters and
592 runs over; the first assumption is, would that be likely to produce fumes?

A. Yes, sir.

Mr. Ryan: Same objection, on the same grounds as to the other hypothetical question; also, that it is indefinite.

The Court: Objection sustained. Strike out the answer. Your assumptions are not

F. D. Jackson, for Pltf., Direct.

definite according to the evidence. Try it again. 573

Q. Assuming that gasoline is drawn from a pet cock into the can, Exhibit #1, (shows) in a small room—a heated room; that the gasoline is then poured slowly into the hole, and that some of it passed into the hole,—most of it,—and perhaps some is spattered around in the vicinity of the hole. Without going any further than that, would that performance, in your opinion, create fumes of gasoline? 594

Mr. Ryan: Objected to on the same grounds as before, including the grounds stated by the court, that it is not definite and in accordance with the evidence.

The Court: Objection overruled.

Mr. Ryan: Exception.

A. It would; the gasoline would be vaporized and turned into a gas. 595

Q. Where would those fumes,—assuming the air in the room was still,—no air movement,—where would the fumes go?

Mr. Ryan: Objected to on the same grounds as before.

The Court: Overruled.

Mr. Ryan: Exception.

596

A. They would fall or lie on the floor.

Q. If there was, within a foot or two of the ground, a lighted lantern with a glass globe, metal top and bottom, an ordinary railroad lantern—you are familiar with them?

A. Yes, sir.

Q. Assuming there was such lantern, and there

F. D. Jackson, for Pltf., Direct.

597 was also a lighted stove—a burning stove six or seven feet away,—a lighted stove in this same room,—10 x 14, dimensions of the room—would those fumes have a tendency to explode if brought into contact with the lantern or stove?

Mr. Ryan: Objected to on the same grounds as before, and assuming facts for which no testimony has been given.

598

The Court: Overruled.

Mr. Ryan: Exception.

A. Under proper conditions; yes, sir.

Q. Under what conditions?

Mr. Ryan: Objected to on the same grounds as before stated.

The Court: Overruled.

Mr. Ryan: Exception.

599

A. That enough oxygen from the air would be admitted—combined with the fumes to produce an explosion.

Q. Supposing you have got an ordinary railroad lantern burning what would be the effect of spattering drops of gasoline on the globe or top of it?

600

Mr. Ryan: Objected to on the same grounds as before, and no foundation laid for the question.

The Court: Overruled.

Mr. Ryan: Exception.

A. The gasoline would immediately be turned into a vapor.

Q. Does that necessarily involve an explosion?

A. No, sir.

F. D. Jackson, for Pltf., Direct.

Q. What would cause that gasoline, so vapor- 601
ized, to explode?

A. Two things or a combination—the right
amount of oxygen combined with the vapor, and
an electric spark or flame.

Q. At what temperature does gasoline volatil-
ize?

A. That depends on the specific gravity; it
volatilizes ordinarily at about 40 degrees, Fahren- 602
heit.

Q. About 40?

A. Yes, sir. It may volatilize below that, de-
pending on the grade of gasoline, or it may be a
little higher than that.

Q. If you should bring gasoline into this room,
whose temperature is 70 degrees, would it imme-
diately volatilize?

A. No, sir; it would take time to do it; if it is
spread out it will volatilize a great deal quicker,
because there is more surface exposed. 603

Q. Do you mean to say it would not volatilize
at that temperature?

A. It would volatilize over the surface ex-
posed; if it is in the form of a spray, the air gets
at it and the temperature has the effect to make
it volatilize fast or slow according to whether the 604
temperature is fast or slow.

Q. Does it volatilize faster as it grows colder
or warmer?

A. As it grows warmer.

Q. If there are gasoline fumes in a confined
space, does the admission of the outer air in-
crease the likelihood of an explosion?

F. D. Jackson, for Pltf., Cross.

605 A. Yes, sir.

Q. When gasoline explodes, what does it do—
or the fumes of gasoline?

A. They are turning from a vapor into a gas,
which causes an expansion, or takes up a larger
area than the fumes itself.

Q. Does it cause a burning—is there a flame?

A. Yes, sir.

606 Q. What makes the flame?

A. Combination of oxygen with the vaporized
gasoline—a chemical combination.

Mr. Ward: That is all.

CROSS EXAMINATION by Mr. Ryan:

Q. Casting aside all these technical instruc-
tions you gave us,—gasoline vaporizing affects
the sense of smell, does it not?

607 A. To a certain extent; yes, sir.

Q. Your sense of smell indicates that the air
you are breathing is saturated with gasoline
fumes?

A. Stepping from the pure air—

Q. Answer the question.

A. I am trying to.

Q. (Previous question read by reporter).

608 A. Under certain conditions, yes, sir.

Q. When you can smell gasoline, that is an in-
dication that the air is saturated with gasoline
vapor?

A. No, sir.

Q. When you smell it, isn't that evidence that
it is vaporizing?

A. Yes, sir.

F. D. Jackson, for Pltf., Re-direct.

Q. And it is evidence the air is saturated— 609

A. No, sir.

Q. And it is evidence that there is gasoline vapor in the air you are breathing?

A. Yes, sir.

Q. To bring a flame into that gasoline permeated atmosphere is likely to produce a flame?

A. It might.

Q. And it may produce an explosion? 610

A. Yes, sir.

Q. That is the reason persons are careful to keep fire away from gasoline?

A. Yes, sir.

Q. That is a matter of common knowledge?

A. Under certain conditions, I suppose so.

Q. Did you ever know of anybody who rationally brought fire into contact with gasoline that was vaporizing? 611

A. Not personally; no sir.

Q. You knew, before you ever went to college, that gasoline vaporizes, did you not?

A. Yes, sir.

Q. It does not take a college education to acquire that knowledge, does it?

A. No, sir.

Mr. Ryan: That is all. 612

RE-DIRECT EXAMINATION by Mr. Ward:

Q. Did you know, Mr. Jackson, what proportion of oxygen should be mixed with gasoline vapor in order to cause an explosion?

A. Did I know?

Q. Yes, sir.

F. D. Jackson, for Pltf., Re-cross.

613 A. No.

Q. The success of the automobile engine finally depended on that proportion being made correct, did it not?

A. Yes, sir.

Q. Now, every automobile on the street, in order to operate successfully has to have the correct mixture of air and gasoline vapor?

614 A. Yes, sir.

Q. The minute that mixture ceases to be correct, the explosion of vapor ceases?

A. Yes, sir.

Q. And the vapor will only explode when the mixture is correct?

A. Yes, sir.

RE-CROSS EXAMINATION by Mr. Ryan:

615 Q. Do you mean that from the advent of the automobile persons did not understand it was dangerous to bring fire into contact with gasoline?

A. No, sir.

Q. That has been understood for a long time?

A. Yes, sir.

616 Q. And the question of the proper mixture of oxygen and gasoline is simply a question relating to economy and efficiency in the propelling of your automobile?

A. I should say that entered into it.

Q. This question of economy and efficiency did not arise until long after persons understood the danger of bringing fire into contact with gasoline?

A. No, sir.

Offering of Stipulation.

Mr. Ward:

617

Q. Could you put a cup of gasoline on the table and light a match to it, with perfect safety?

A. Yes, sir.

Q. Will it explode?

A. No, sir.

Mr. Ryan:

Q. Do you think it is necessary for a person to have knowledge of the proper admixture of gas and air in order to effectually operate an automobile, in order to understand the danger of bringing a flame into contact with gasoline?

618

A. No, sir.

Q. That is not at all necessary?

A. No, sir.

Mr. Ryan: That is all.

Mr. Ward: I offer a stipulation made between the plaintiff and defendant in this action; I will read it:

619

"That at the time of the plaintiff's injury, on the 25th of December, 1915, and for a considerable period prior thereto, trains carrying interstate traffic ran daily over the Buffalo Division of the defendant, between Hornell, N. Y., and Buffalo, N. Y.

620

That at the time of the Plaintiff's injury, on the 25th of December, 1915, and for a considerable period prior thereto, water from the water tank mentioned in the complaint was supplied daily in part to defendant's engines at the time engaged in hauling interstate freight and in part to defendant's engines at the time hauling intrastate freight."

Motion for Nonsuit.

621 Dated, November 19th, 1917. Signed by
the attorneys for the respective parties. -
Plaintiff rests.

622 Mr. Ryan: Defendant moves for a non-
suit, on the ground that, at the time of the
plaintiff's injury the plaintiff was not em-
ployed in interstate commerce, within the
meaning of that term as used in the Feder-
al Employer's Liability Act, and that,
therefore, this court has no jurisdiction
of this action.

Second: On the ground that the testi-
mony shows that plaintiff's injury was due
solely to his own negligence.

623 Third: On the ground that there is no
evidence in this case, or anything to show,
that defendant was negligent.

Fourth: On the ground that the testi-
mony shows that the plaintiff, as a matter
of law, assumed the risks of the injury
which he received.

We have this briefed up, and I do not
think there is any necessity for oral ar-
gument.

624 The Court: I have carefully examined
the demurrer and the points raised, and
Judge Hazel's memorandum on the de-
murrer, and have made an examination of
the cases myself, touching this question of
law which you raise, and I feel that I will
deny the motion. You have the exception.
On the other grounds,—I think I will over-

L. L. Christ, for Deft., Direct.

rule those grounds, and deny the motion; 625
you have the exception to that also.

Mr. Ryan: Exception to the denial of
the motion.

The Court: (Addressing the jury):

Gentlemen: The motions counsel has
made are primarily questions of law, with
which you are not concerned, and, of
course, the action of the court in denying 626
the motions, will have no effect upon you
when the case reaches you; it is primarily
a matter of law, and the court may be
right, or may be wrong, and whether I am
right or not is of no interest to you. I men-
tion this so that you will not think it has
any effect whatever on the evidence or
what the court thinks, because what the 627
court thinks on the questions of fact is not
of interest to you, nor is the question of
what the court thinks about the law of any
interest to you.

Adjournment taken until 10:00 o'clock
a. m. November 22nd, 1917.

Proceedings November 22nd, 1917, 10:- 628
00 o'clock a. m. .

LEON L. CHRIST, being duly sworn as a wit-
ness for defendant, testified as follows:

Direct Examination by Mr. Ryan:

Q. Mr. Christ, you reside in Buffalo?

A. Yes, sir.

L. L. Christ, for Deft., Direct.

629 Q. You are employed by the Erie Railroad Company?

A. Yes, sir.

Q. In what capacity?

A. Civil engineer.

Q. You made a plan of the pump house at Canaseraga, N. Y.?

A. Yes, sir.

630 Q. On the date shown on the plan,—November 14th, 1917?

(Witness shown map or plan).

A. Yes, sir.

Q. This plan that I show you is the one you made?

A. Yes, sir.

631 Q. The different plans and sketches shown there were made from measurements taken by you?

A. Yes, sir,—actual measurements.

Q. And the scale of each is shown on that plan?

A. Yes, sir.

632 Q. On the upper part of the plan you have marked "Situation Plan"; that part shows the location of the three tracks running by the pump house?

A. Yes, sir.

Q. You have located on it the gasoline supply tank?

A. Yes, sir.

Q. From which gasoline is taken into the pump house, for the operation of the engine?

A. Yes, sir.

L. L. Christ, for Deft., Direct.

Q. This is the tank which you understood contained the supply for the pump house? (Shows). 633

A. Yes, sir.

Q. Then you have shown on that map the pump house?

A. Yes, sir.

Q. Next, within a circle—what does that circle indicate?

A. A well from which the water is drawn. 634

Q. Drawn by the pump in the pump house?

A. Yes, sir.

Q. The next rectangular figure indicates the location of the tower? (Shows).

A. "C. S." tower.

Q. Then that rectangular figure there indicates the location of a box car? (Shows).

A. Yes, sir.

Q. A box car that was taken off its wheels? 635

A. Yes, sir.

Q. The water tank is not shown on that sketch?

A. No, sir; that is farther up the track.

Q. To the west?

A. To the east.

Q. Can you estimate the distance from the pump house to the tank? 636

A. Yes, sir; it is about 1,000 feet.

Q. The tank is located near the southerly track—between the right-of-way fence and the first track?

A. Yes, sir; between the right-of-way fence and the east-bound track.

Q. On the company's property?

L. L. Christ, for Deft., Direct.

637 A. I think so; yes, sir.

Q. The "Situation Plan," the upper part, is shown to be to a scale of one inch to ten feet? (1" = 10 ft.)

A. Yes, sir.

Q. Over here you have a ground floor plan of the pump house? (Shows).

A. Yes, sir.

638 Q. Showing the pump house in its relation to the tracks?

A. No, sir; the pump house is not located in regard to the tracks there at all.

Q. Not as to distance, but is the door of the pump house, which you show there, on the side towards the track?

A. Yes, sir.

639 Q. So that, as far as direction is concerned, the plan of the pump house is shown correctly in relation to the tracks?

A. Yes, sir.

Q. In one corner of the pump house you show a coal bin?

A. Yes, sir.

Q. Then the location of the engine and pump within the pump house?

640 A. Yes, sir.

Q. Then the work benches over at the easterly end?

A. Yes, sir.

Q. There is, or there was when you were there, a stove in the pump house?

A. Yes, sir.

Q. You do not show the location of that?

L. L. Christ, for Deft., Direct.

A. No, sir, I do not show the location of that. 641

Q. Can you give us that, approximately?

A. Yes, sir.

Q. Give it.

A. Approximately between the engine base and this wall.

Q. That is between the engine base—

A. I should judge about seven feet from the engine base.

Q. Between the engine base and the southerly wall? 642

A. The westerly wall,—this is the easterly wall.

Q. Will you mark a cross on that plan to show the points of the compass.

A. On the railroad, the tracks towards Jersey City are considered east; this is the easterly direction here. 643

Q. So that your map shows the general direction of the railroad route?

A. Yes, sir.

Q. That is drawn in relation to the general route of the railroad?

A. Yes, sir.

Q. Not according to actual compass directions? 644

A. No, sir.

Q. So that, on that map, the arrow towards Hornell points to the general easterly direction of the railroad company's route?

A. Yes, sir.

Q. And does not really indicate east by the direction of the compass?

A. No, sir.

L. L. Christ, for Deft., Direct.

645 Q. So that,—to get at it in another way,—the stove is located between the engine and pump and the wall of the pump house farther away from the tracks?

A. Yes, sir.

Q. What do you say of the distance of the location of the stove either from the engine or wall?

646 A. I should judge it was approximately seven feet from the engine base.

Q. Then your plan of the pump house is drawn—that ground floor plan—one inch equal to four feet? (1" = 4 ft.).

A. Yes, sir.

Q. Will you scale that and give us the dimensions of the pump station?

647 A. I think I have that here in my book. The pump house is 25 ft. 1" x 14 ft. 2", outside dimensions.

Q. Running parallel with the track 25 feet?

A. Yes, sir,—25 ft. 1".

Q. And running away from the track—

A. 14 ft. 2".

648 Q. At the lower part of the map, opposite the tracks, and in the center, you have shown a side elevation of the engine and pump?

A. Yes, sir.

Q. In that sketch you show the rear elevation,—rear end elevation, side elevation, and a plan looking down upon the engine and pump from above?

A. Yes, sir.

Q. Are those all drawn to the same scale?

L. L. Christ, for Deft., Direct.

A. No, sir; they are all drawn to the scale of 649
one inch to the foot.

Q. All three of them are drawn to the scale of
one inch to the foot? (1" = 1 ft.).

A. Yes, sir; all to the same scale.

Q. To the centre of the sketch marked "Side
Elevation,"—the upper wheel on that sketch re-
presents what?

A. That represents the fly wheel of the engine. 650

Q. Just to the left of the fly wheel you show
an air pump?

A. I don't know what it is; it is a small pump,
—hand pump.

Q. That was on the engine?

A. Yes, sir.

Q. That is the pump shown at the left of the
wheel in Exhibit D-4? (Shows).

A. Yes, sir. 651

Q. And the fly wheel which you show is the
same one shown in this photograph, Exhibit #4?
(Shows photographs).

A. Yes, sir.

Q. In the photograph, Exhibit D-2 is shown
the cylinder?

A. Yes, sir.

Q. Do you show that cylinder on that side el- 652
elevation?

A. Yes, sir.

Q. A side view of it?

A. Yes, sir. (Shows).

Q. On the upper part of your cylinder, to the
left, you have two black dots; what do those in-
dicate on that sketch?

A. The dot on the top of the center indicates,
I think, the priming pet cock.

L. L. Christ, for Deft., Direct.

653 Q. Which is shown in the photograph Exhibit D-2?

A. Yes, sir.

Q. With a spring stop—

A. No, sir; the other one turned directly in the center of the cylinder, indicated on the plan here.

654 Q. Keeping to the side elevation,—the priming cock is the upper one of the two black dots?

A. Yes, sir.

Q. Then what does the other black dot indicate on that sketch?

A. As I understand it, the other one indicates the starting contrivance.

Q. That is indicated in this photograph?

A. Yes, sir.

655 Q. That has a spring?

A. Yes, sir.

Q. I call your attention to the photograph Exhibit D-3, which shows the pump shown in that center sketch at the left of the fly wheel? (Shows).

A. Yes, sir.

Q. Your sketch does not show the small pump shown in the photograph between the wheels?

656 A. No, sir, my sketch does not show the details.

Q. Then just above that side elevation sketch you show a figure of two long lines detached from the rest of the sketch; what do they indicate?

A. A small 1 x 2, extending down from the ceiling over the engine.

Q. To which is attached what?

A. Wires for ignition are carried down on

L. L. Christ, for Deft., Direct.

that, and there is a small switch located here; 657
(shows) that board carries the wires down for
the ignition system, and there is a small switch
attached here.

Q. By which the current is turned on?

A. Yes, sir; thrown off and on.

Q. Before leaving the side elevation,—what is
the distance from the priming pet cock to the
front of the cylinder? 658

A. Do you call this the front? (Shows).

Q. Yes, sir.

A. I should say 6 inches—yes, sir, six inches.

Q. In your center sketch you show, at the left,
the pump, do you not?

A. Yes, sir.

Q. Then by a circle, about midway up the
pump—a small circle—you indicate the entrance
point of the water pipe to the pump? 659

A. Yes, sir; that is a horizontal stretch of
water pipe.

Q. Extending to the upper line of the cylinder
in a straight line until it comes to a point above
the center of the water pipe—the center of the
horizontal water pipe? What is the distance
from the priming pet cock to that point directly
above the center line of that horizontal water 660
pipe.

A. I should say approximately 1 ft. 6".

Q. Can't you tell it exactly?

A. Yes, sir. I can exactly say; it is 1 ft. 4".

Q. On that map, by pencil, just extend that
upper line of your cylinder.

A. Is that what you mean? (Shows).

Q. Yes, sir. Now will you extend, in a ver-

L. L. Christ, for Deft., Direct.

661 tical line, the center line of your horizontal water pipe?

A. Yes, sir. (Shows).

Q. Along the horizontal line extended, to the point where it intersects the vertical line is 16 inches?

A. Yes, sir.

662 Q. Along that vertical line from the upper side, to the horizontal line—to the horizontal water pipe, is what distance?

A. 23 inches.

Q. That is from the upper side of the horizontal water pipe to—

A. From the center.

Q. I asked you from the upper side of the water pipe.

663 A. It would be 19½ inches.

Q. From the upper side of the water pipe to the extended horizontal line?

A. Yes, sir.

Q. In other words, from the upper side of the water pipe to the upper side of the cylinder, which contains the priming cock, would be 19 ½ inches?

A. Yes, sir.

664 Q. Then to the left you show the rear end elevation of the pump and engine?

A. Yes, sir.

Q. The pump is at the rear of the engine?

A. Yes, sir.

Q. And the large circle at the left of the rear elevation shows what?

A. That indicates the cylinder of the pump.

L. L. Christ, for Deft., Direct.

Q. And the upper and smaller circle at the right indicates what? 665

A. The cylinder of the engine.

Q. And the dimensions which you have given us in reference to the height of the cylinder and location of the priming cock relate to the cylinder of the engine, and not to the cylinder of the pump?

A. Yes, sir.

Q. The cylinder of the pump is not shown on the side elevation? 666

A. No, sir.

Q. Then in your rear end elevation you have marked the water pipe?

A. Yes, sir.

Q. That indicates the horizontal pipe in the photograph, Plaintiff's Exhibit #2? (Shows). 667

A. Yes, sir.

Q. Running, in the photograph, from the pump, to the right of the photograph?

A. Yes, sir.

Q. On which there is an "X" mark?

A. Yes, sir.

Q. From the floor level to the upper side of the water pipe directly below the engine cylinder, what is the distance? 668

A. 25 inches.

Q. Then at the right you have shown a plan of the engine, as it would be disclosed to a person looking down on the engine and pump from above?

A. Yes, sir.

Q. And in the center, or near the center of that plan you have indicated the engine cylinder?

L. L. Christ, for Deft., Cross.

669 A. Yes, sir.

Q. And on that engine cylinder two black dots?

A. Yes, sir.

Q. One indicating the priming cock?

A. Yes, sir.

Q. And the other—

A. The starting point.

670 Q. Then running down towards the bottom of the plan,—towards the side elevation shown,—there is indicated the water pipe?

A. Yes, sir.

Q. The same one which is shown in the rear end elevation?

A. Yes, sir.

Mr. Ryan: That is all.

671 CROSS EXAMINATION by Mr. Ward:

Q. Just one question. This water pipe from which the upright pipe stands, is shown in Exhibit #2? (Shows. Is the upright pipe shown in Exhibit #2 intended to be represented by the circle on the plan which Mr. Ryan last referred to?

A. Yes, sir.

672 Q. What is the distance along that water pipe, from the nearest point of the circle to the cylinder—the nearest point on the cylinder projected, from the water pipe?

A. That scales about 1 ft. 8".

Q. Did you see the stove there?

A. Yes, sir.

Q. What kind of stove was that?

A. One of those old fashioned coal hopper stoves, fed from the top.

L. L. Christ, for Deft., Re-direct.

Q. With a damper in it? 673

A. I presume so; yes, sir.

Q. Down near the floor—any dampers near the floor?

A. A small front stove damper to the front door.

Q. That has a damper to the top door and also to the door they take the coal out of?

A. Yes, sir. 674

Q. That is in the lower part of the stove?

A. Yes, sir, on the base.

Q. Sets on little short legs, or right on the floor?

A. Right on the floor.

Q. This lower damper goes into the grate about how high above the floor?

A. I should estimate it about six inches above the floor. 675

Mr. Ward: That is all.

RE-DIRECT EXAMINATION by Mr. Ryan:

Q. What was the distance that you gave Mr. Ward,—1 ft. 8"?

A. Yes, sir; 1 ft. 8".

Q. Now, will you extend the center line of the engine cylinder across to the horizontal water pipe? 676

A. 2 ft. 4".

Q. You gave that last measurement without any question on the stenographer's record. After you have extended the center line of the engine cylinder across the water pipe—the horizontal water pipe, will you give us the distance from the

W. L. Collins. re-called for Pltf., Direct.

677 inner side of the vertical water pipe to the extended line of your cylinder—the extended center line?

A. From there to here? (Shows).

Q. Yes, sir; that is the distance you gave us, but there was no question?

A. 2 ft. 4 inches.

678 Mr. Ryan: I offer the map in evidence. Received in evidence, without objection, and marked Defendant's Exhibit #10. Defendant rests.

WILLIAM L. COLLINS, re-called in his own behalf, and testified as follows:

679 Direct Examination by Mr. Ward:

Q. Mr. Collins, I show you Plaintiff's Exhibit #2, and Defendant's Exhibit #4, both of which show lanterns hanging on the wall inside of the pump house? (Shows).

A. Yes, sir.

680 Q. Were those lanterns there when you worked there at the time of the accident?

A. No, sir.

Q. I also call your attention to the door shown in this Defendant's Exhibit #4, with a knob on it; was there any knob on the inside of that door?

A. No, sir.

Q. At the time of this explosion?

A. No, sir.

W. L. Collins, re-called for Pltf., Cross.

Q. I also call attention to the open windows— 681
the two open windows shown in the photograph,
Exhibit #2: were those windows open at the
time of the accident—not boarded up; were there
glass windows there?

A. One window was not boarded up.

Q. One window was not boarded up?

A. Yes, sir.

Q. Was the other window boarded up? 682

A. Yes, sir.

Q. Was the one that was not boarded up,—
was that partially boarded up?

A. No, sir.

Q. Not partially boarded up?

A. No, sir.

Q. So that one window was as it appears in
the photograph? 683

A. Yes, sir.

Q. And the other was boarded up?

A. Yes, sir.

Mr. Ward: That is all.

CROSS EXAMINATION by Mr. Ryan:

Q. Did you ever look to see whether a lantern
was in the position shown in the photograph? 684

A. Yes, sir.

Q. When did you look for a lantern at that
point?

A. The night I went in there.

Q. That is the night of the accident?

A. Yes, sir, the night of the accident.

Q. You went in there with a lantern?

A. Yes, sir.

W. L. Collins, re-called for Pltf., Cross.

685 Q. What was the next thing you did when you got inside there?

A. I started taking gasoline out of the engine.

Q. Did you look around at all for appliances before you started taking the gas out?

A. Yes, sir.

Q. What did you do in reference to looking?

686 A. Tried to get a better view on the engine—a better light on the engine.

Q. The night you went in there with the other employee there, you had a lantern of the kind you took in with you that night?

A. Yes, sir.

Q. You do not remember whether it was the same lantern or a similar one?

A. A similar lantern.

Q. Possibly the same one?

687 A. Yes, sir.

Q. The lantern which you took in there, placed in the position in which you placed it, below the level of the priming cock, gave you plenty of light with which to do that work, did it not?

A. Yes, sir.

Q. And shed a direct light on the priming cock, didn't it?

688 A. Yes, sir.

Q. Now you say, that before you used that lantern which shed plenty of light on the priming cock, you looked about for another lantern to give you better light; do you mean that?

A. Yes, sir.

Q. For what kind of lantern were you looking?

W. L. Collins, re-called for Pltf., Cross.

A. I don't know.

689

Q. But you had a lantern which did give you plenty of light on the work you were doing?

A. Yes, sir.

Q. Still you were looking around for a lantern to give you a better light?

A. Yes, sir.

Q. Where did you look?

A. On the wall.

690

Q. Where else?

A. That was all.

Q. There were two benches or shelves running along one side of the engine house, weren't there?

A. Yes, sir.

Q. They were there that night, weren't they?

A. I think so; yes, sir.

Q. Did you look to see whether a lantern was placed on the shelf or not?

691

A. No, sir.

Q. So that you don't know whether there were other lanterns in that pump house or not?

A. I didn't see any others.

Q. Answer the question. You don't know whether there were others lanterns in that pump house that night or not?

692

A. No, sir.

Q. There might have been placed on the shelf in this pump house a lantern of the kind shown on the wall in this photograph?

A. There might have been.

Q. And you did not look there to see whether there was one there or not?

W. L. Collins, re-called for Pltff., Cross.

693 A. I looked for one, but it wasn't there— I didn't see any.

Q. You didn't look on the shelf, did you?

A. I looked around.

Q. Did you look on the shelves?

A. Yes, sir,—I might have; I don't remember.

Q. Didn't you say a minute ago that you did not look on the shelves?

694 A. I don't remember whether I did or not.

Q. Didn't you say a minute ago that you did not look on the shelves?

A. Yes, sir.

Q. Was that true?

A. Yes, sir.

Q. And you didn't look on the shelves, did you?

695 A. I don't remember whether I did or not.

Q. Had you seen a lantern of another kind about there?

A. No, sir.

Q. And you say you had no information that there was any lantern of another kind there?

A. No, sir.

Q. Or that a lantern of another kind had ever been used in connection with the pump house?

696 A. No, sir.

Q. Still you were looking for something that you had never seen, or never had heard of; is that right?

A. Yes, sir.

Q. Looking for something that you never had seen or heard of its use in connection with that pump house; is that right?

W. L. Collins, re-called for Pltff., Re-direct.

W. F. Jeffries, re-called for Pltff., Direct.

697

A. Yes, sir.

Q. Something that you never had heard of being used in connection with that pump?

A. Yes, sir.

Q. And for a kind of lantern of which you did not know?

A. Yes, sir.

Q. Is that right?

698

A. Yes, sir.

Q. How long did you look for it?

A. I don't remember.

Mr. Ryan: That is all.

RE-DIRECT EXAMINATION by Mr. Ward:

Q. Was a fire burning in the stove at that time?

699

A. Yes, sir.

Q. Do you remember what the condition of the drafts were—whether open or closed?

A. Open, as I remember it.

Q. This was what kind of weather?

A. It was a cold night.

Mr. Ward: That is all.

700

WILLIAM F. JEFFRIES, re-called for plaintiff, and testified as follows:

Direct Examination by Mr. Ward:

Q. I call your attention to Defendant's Exhibit #4 and Plaintiff's Exhibit #2, both of which show lanterns hanging on the wall inside of the pump house? (Shows).

Motion for Nonsuit.

701 A. Yes, sir.

Q. Were those there at the time of Mr. Collins' accident?

A. I don't know; I can't tell.

Q. When were those photographs taken, Mr. Jeffries?

Mr. Ryan: The date is on there, I think.

Mr. Ward: Never mind the question. The photograph shows they were taken on the 16th day of November, 1917.

702

Mr. Ryan: Yes, sir; and I am willing to put on the record that I did not photograph that lantern in order to make the claim it was there at the time of the accident; it may have been there, but I have not produced any evidence that it was there at the time the accident occurred.

703

Evidence closed.

Mr. Ryan: I renew the motion made at the close of the plaintiff's case, on all the grounds stated at that time—on the motion for a nonsuit, and on the same grounds I ask your Honor to direct a verdict in favor of the defendant of "No cause of action."

The Court: Motion denied.

704

Mr. Ryan: Exception. That is each motion is denied, and I have the exception to each denial?

The Court: Yes.

Defendant's counsel sums up case to jury.

Plaintiff's counsel sums up case to jury.
Recess taken until 1:30 o'clock p. m.

CHARGE TO JURY.

Gentlemen of the Jury:

705

You have been assisted in this case by capable and earnest counsel, and they have made clear their contentions in argument, and have endeavored on each side so to present the testimony as to support their point of view.

You were quickly selected, I assume, because both sides believed that you would approach the consideration of this cause with a strict adherence to your oath of office, uninfluenced by any considerations except the testimony in the case, and uninfluenced by any of those sympathetic and humane considerations which might weigh upon your mind and mine in our homes, but which are not permitted to enter into your solemn and oath bound deliberations as jurors.

706

707

Under our wise system of government all stand equal before the law, and whether the plaintiff be rich or poor, and the defendant be a single individual or a corporation, each stands equally entitled to a verdict only upon the law and the evidence.

During the arguments of counsel you have heard reference made to many legal expressions, and in the course of this charge use will be made of certain words and phrases which have some legal significance, hence, I shall digress, for the moment, to define those so commonly used, that you may have a clearer understanding of them and may thus the more readily comprehend the full purport and effect of those legal expressions.

708

Charge to Jury.

- 709 Negligence consists in the failure to observe that degree of care which the law requires for the protection of the interests likely to be injuriously effected by the want of it. It may be an act of omission,—that is, failing to do something which should have been done, or an act of commission,—that is, doing something which should not have been done, and in such case the standard
- 710 always is the standard of an ordinarily prudent man under the circumstances of the given case.

Contributory Negligence may be defined as a failure to use such care for one's safety as an ordinary prudent person, in similar circumstances, would use. This also may be an act of commission, or an act of omission.

- 711 Assumption of Risk is a term in a contract of employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk.

- 712 Fair Preponderance of Evidence means greater weight of evidence, or evidence which is more credible and convincing to the mind.

With these preliminary and brief definitions for your guidance, some of which will be amplified later, I will now discuss with you the main features of the case.

In this action, the plaintiff, William M. Collins, an employee of the Erie Railroad Company,

Charge to Jury.

seeks to recover damages for injuries alleged by him to have been sustained on the 25th of December, 1915, in the pumping station of the defendant company near Canaseraga, New York, as the result of a gasoline explosion, and his suit is brought under what is now commonly known as the Federal Employer's Liability Act. 713

In 1908, by virtue of an Act of Congress, this law came upon the statute books, and it changed some of the rules of law which had, by a long line of decisions, become fixed in the jurisprudence of this country. Recognizing the harshness of those rules,—or, at least, some of them,—Congress sought, by this act, to remedy what was believed to be an injustice to employees of railroads, for, as you doubtless know, Congress, as the law making body of the nation, was the only authority which could change the then existing rules of law which the courts had established. 714 715

Prior to the passage of this Act, it was true in many,—and I may say in almost all jurisdictions, that before the plaintiff could recover in an action predicated on negligence he must prove his own freedom from negligence, that is, that he was not guilty of contributory negligence, and that if he failed to show his own freedom from negligence, or, under certain rules, if the defendant should prove that the plaintiff contributed to the negligence, he would be barred from a recovery. But in this Act Congress said, even though the plaintiff were guilty of contributory negligence, that that should not bar a recovery, but that it should. 716

Charge to Jury.

717 where proven, diminish the damages to be awarded, and in a manner which I shall presently state.

The portions of the Act pertinent to this case are as follows:

718 "Every common carrier by railroad while engaging in interstate commerce between any of the several states shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce for such injury, resulting in whole or in part from the negligence of any of its officers, agents or employees of such carrier," and furthermore, "that in all actions hereinafter brought against any such common carrier by railroad, the fact that the employees may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

719

The section of the statute in reference to the assumption of risk—which is also pertinent in this case,—I will quote and discuss with you later.

720 This statute, however, has not relieved the plaintiff of the obligation of showing that the act or acts complained of was due to the negligence of the defendant. This action, as all actions brought under the statute, are predicated upon some negligent act of the defendant company, and the duty still rests upon a plaintiff of proving negligence, and the mere fact that an accident has happened

Charge to Jury.

and someone has been injured does not accord to a plaintiff a cause of action. The plaintiff must still satisfy you by a fair preponderance of the evidence that the accident complained of happened through the negligence of the defendant. 721

First of all,—no action can be maintained under this statute unless it appears, and is established by a fair preponderance of the evidence, and proven by the plaintiff, that the work which was being done at the time of the accident was incidental to interstate commerce. The court has decided, upon proper motion made by the defendant, that at the time of the accident the defendant was engaged and the plaintiff was employed in such interstate commerce as to bring this case within the purview of the Act, so that you need not be concerned with that question. 722 723

The law places the burden upon the plaintiff of proving, by a fair preponderance of the evidence, that the negligence of the defendant,—whatever that negligent act may have been, if any,—either of omission or commission,—caused the accident; and likewise, the law places upon the defendant railroad company the burden of proving, by a fair preponderance of the evidence, that the negligence of the plaintiff, if any, contributed to the accident, and that is a question of fact to be determined by you from a consideration of all of the evidence in the case. 724

When I state that the plaintiff is obliged to prove this, and the defendant is obliged to prove

Charge to Jury.

725 that, you are to determine the question of whether each has met the burden of proof from a consideration of all of the evidence. The only witness introduced on the part of the defendant is the engineer, who testified in reference to the map. The claims of the plaintiff, if they are supported by the evidence, are supported by the evidence introduced by the plaintiff, and that is the evidence in the case which you may consider; it does not necessarily follow, that because the defendant offered no evidence there is nothing to prove his case; it is from a consideration of all of the evidence in the case that you are to determine whether the claims of one side or the other find support.

727 I may say at this point, that if the plaintiff has failed to prove by a fair preponderance of the evidence, that some negligent act of the defendant caused this accident, then your inquiry is ended, and your verdict should be for the defendant as "No Cause of Action," because, as I stated in the beginning, this action is predicated upon negligence, even if it is under the Federal Employer's Liability Act. But, if you should find that the plaintiff has sustained this burden, your inquiries will proceed, and you will next determine whether from all the evidence the defendant has established by a fair preponderance of the evidence that the plaintiff was guilty of contributory negligence in any respect,—that is to say, if you find from the evidence that there was some negligent act which caused this accident,

728

Charge to Jury.

you will next determine whether the plaintiff was 729
 guilty of contributory negligence. If you find he
 was not, and you find the presence of negligence
 on the part of the defendant, the verdict you find
 the plaintiff is entitled to receive will not be re-
 duced at all; but, on the other hand, if you find
 from the consideration of all of the evidence that
 the defendant has established by a fair prepon-
 derance of the evidence that the plaintiff was 730
 guilty of contributory negligence, then you will
 proceed to determine what the whole damage is,
 and then deduct from it what you, in your best
 judgment, within the rules which I will give you
 later, shall determine to be the proportionate
 amount of negligence which, in your opinion, is
 attributable to Collins.

This discussion of the question of the affirma- 731
 tive negligence of the defendant and contributory
 negligence of the plaintiff is entirely apart, for
 the moment, from the doctrine of Assumption of
 Risk, which I will take up later.

I trust I make that point clear, gentlemen?

Laying aside, for the moment, the question of 732
 the doctrine of Assumption of Risk, and confin-
 ing ourselves for the moment only to considering
 two things,—the negligence of the defendant—
 was there any? If there was not, there is no re-
 covery, and other questions are immaterial. If
 there was negligence on the part of the defendant
 in some act, or some failure which constituted

Charge to Jury.

- 733 negligence, and you find that fact, your next inquiry is, "Was the plaintiff guilty of contributory negligence?" Under the old decisions and the old law, if he was, he could not recover in many jurisdictions, but this Act, as I stated before, says, in effect, if he was, he must be punished to a certain extent,—not to bar his right of recovery, but to reduce the damages which he
- 734 would be entitled to receive in proportion as his negligence contributed to that accident.

So that, if you find negligence on the part of the defendant, and if you find no contributory negligence on the part of the plaintiff, you will proceed and figure up what his damages are.

- 735 If you find that he was guilty of contributory negligence, determine in what amount he was guilty of contributory negligence and deduct it from the whole amount. In other words, if his whole damage is one dollar, and his contributory negligence is fifty cents, his recovery would be for the balance—fifty cents. I use those ridiculous figures in this case, but you will get the point.

- 736 But the defendant claims, that even if you reach the conclusion that the plaintiff is entitled to recover upon the features of the case I have thus far discussed, that this statute which we are discussing, and under which this suit is brought, gives to the defendant a defense which is a complete bar to any recovery.

Charge to Jury.

This defense is commonly called the Assumption
 tion of Risk. In the third paragraph of defend- 737
 ant's answer it is alleged that the plaintiff as-
 sumed the risk of receiving personal injuries from
 the dangers incidental to and inherent in that
 employment, and that the injury alleged in the
 complaint arose from a danger incidental to and
 inherent in the defendant's business, and that the
 plaintiff assumed the risk of receiving such in- 738
 jury.

Section 4 of the Act under discussion provides,
 —and which I earlier told you I would quote and
 discuss,—that, “In any action brought against
 any common carrier under or by virtue of any of
 the provisions of this Act to recover damages
 for injuries to, or the death of any of its em- 739
 ployees, such employee shall not be held to have
 assumed the risk of his employment in any case
 where the violation by such common carrier of
 any statute enacted for the safety of employees
 contributed to the injury or death of such em-
 ployee.”

This section has been construed by the Supreme
 Court of the United States to mean that that Act 740
 does not abolish the defense of the Assumption
 of Risk, except where the carrier's violation of a
 statute enacted for the safety of employee's con-
 tributed to the death or injury. As no such stat-
 ute,—for example, the safety appliance statute,
 is here involved, the conclusion necessarily fol-
 lows that the defense of Assumption of Risk is

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Charge To Jury.

741 available to this defendant in this action. But as this is an affirmative defense, the burden of proof rests upon the defendant to satisfy you by a fair preponderance of the evidence that the plaintiff assumed the risks incidental to the employment, and within the rules of law applicable thereto.

742 Contributory negligence involves the notion of some fault or breach of duty on the part of the employee, and since it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as a failure to use such care for his own safety as ordinarily prudent employees in similar circumstances would use. On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee. The risks may be present notwithstanding the exercise of all reasonable care on his part. Some employments are necessarily fraught with danger to the workman, —danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are 743 presumably taken into account in fixing the rate of wages. Risks not naturally incident to the occupation may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work, and suitable and suitable safe appliances for the work, or a proper manner of operation. These the employee is not 744 treated as assuming until he becomes aware of the

Charge To Jury.

defect or disrepair and of the risk arising from it, unless the defect and risk alike are so obvious that an ordinarily prudent person under similar circumstances would have observed and appreciated them. 745

When the employee does know of the defect, and appreciates the risk that is attributable to it, then, if he continues in the employment, without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arises out of the master's breach of duty. 746

An employee assumes the risk of dangers normally incident to the occupation in which he voluntarily engages, so far as these are not attributable to the employer's negligence; but, the employee has the right to assume that his employer has exercised proper care with respect to providing a safe place to work, and suitable and safe appliances for the work, and a safe manner of operation, and is not to be treated as assuming the risk arising from a defect that is attributable to the employer's negligence, until the employee becomes aware of such defect, or unless it is so plainly observable that he may be presumed to have known of it. 747 748

Moreover, in order to charge an employee with the assumption of risk attributable to a defect due to the employer's negligence, it must appear

Charge To Jury.

749 not only that he knew,—or is presumed to have known,—of the defect, the defective appliance, defective place to work, or defective manner of operation, but that he knew it endangered his safety, or else such danger must have been so obvious that an ordinarily prudent person under the circumstances would have appreciated it.

750 In connection with this defense, gentlemen, you must carefully consider all the evidence in the case and decide from it,—even if you find there was negligence on the part of the defendant,—whether Collins knew, or could at his age be presumed to have known, under all the circumstances of the case, of the dangers normally incident to the operation of this engine in the manner described, and that the operation as described endangered his safety. If, from the evidence, you find that he did know it, or was presumed to have known it, and you find the defendant was negligent, he could not recover.

752 On the other hand, finding the defendant negligent, if you further find that Collins either did not know, or could not at his age be presumed to have known that such operation endangered his safety, you will necessarily conclude that he did not assume the risk of his employment, in which case you will then rely upon your conclusions concerning the negligence of the defendant and Collins' contributory negligence in arriving at your final conclusion,—both of which I have discussed. That is to say, if you find that Collins assumed

Charge To Jury.

the risk, this case ends there, and there can be 753
 no recovery. If you find he did not assume the
 risk, and that there was some negligent act of
 the defendant which caused the accident, pro-
 ceed to determine whether the plaintiff was guilty
 of contributory negligence, and if he was, re-
 duce the whole amount as I have already in-
 structed you.

Where the employer sets his employee at new 754
 work in conditions of danger not understood or
 appreciated by the employee, the employer is
 bound to warn him of the peril, and if the work
 is to be done by machinery, with the operation of
 which the employee is not acquainted, and there
 is a safe way and an unsafe way, the employer,
 if he has reason to know that the employee is 755
 unskilled, is required to give him instructions for
 operating it in the way by which he will avoid in-
 jury, and in order to determine this question you
 must take into careful consideration all of the
 testimony in the case which will in any way be of
 guidance to you in your deliberations.

Of course, you know, gentlemen, that your ver- 756
 dict, the same as the verdict of every jury, con-
 sists of two things: First, the truth as you find
 it; Second, the principles of law applicable to
 that truth. In that way you get at the result
 which we call a verdict.

These principles of law affect either the whole
 or some particular features of the case, and in

Charge To Jury.

757 any instance you are to bear them carefully in
mind and diligently apply them where they are
applicable.

758 Courts are established to administer the law
and enforce its regulation. The law, therefore,
is the only standard by which judges and juries
can be governed; and in considering your verdict
you should be governed by the law as it is given
by the court, and by the evidence as you hear it
from the witnesses.

You have heard the evidence for and on be-
half of both sides of this case, and from that evi-
dence you must decide what the facts are and
where the truth is.

759 Counsel have had complete freedom of argu-
ment before you upon all questions of fact. It is
their privilege in argument to criticize the evi-
dence. It is also the privilege of the plaintiff to
criticize the conduct of the defendant, and for the
defendant to criticize the conduct of the plaintiff;
to impugn their respective motives, if the evi-
dence justifies it, and to attack the credibility of
760 the witnesses.

Arguments of counsel are not evidence, how-
ever, and only insofar as their respective claims
are supported, in your opinion, by the evidence
in the case, are their claims to receive considera-
tion at your hands. You should arrive at your
verdict only after calm and careful consideration
of all the evidence in the case.

Charge To Jury.

I have already stated that the fair preponderance of the evidence is the rule by which either the plaintiff or defendant must prove their material allegations; that it is upon the plaintiff to prove the negligence of the defendant, and upon the defendant to prove the contributory negligence of the plaintiff, and also upon the defendant to prove the assumption of risk. 761

Whether or not the proof has reached that point you are to determine by weighing all the evidence in the case presented to you. 762

The law says, in effect, that unless the plaintiff satisfies you throughout the entire case of the correctness of his claim, where the burden is upon him, to such an extent that it outweighs the proof of the defendant, he cannot recover; or, if the testimony of the plaintiff in reference to the burden which is upon him weighs just the same as that of the defendant, you must then find for the defendant, for the plaintiff has not, in such case, sustained the burden of proof. The plaintiff can only recover where his evidence or proof, where the burden is upon him, outweighs that of the defendant; and the defendant, on the other hand, cannot maintain his claims in reference to contributory negligence and assumption of risk unless he or it has met the burden of proof, and satisfied you by a fair preponderance of the evidence as to those two claims. 763 764

In analyzing the testimony and drawing conclusions from it you must use all of your experi-

Charge To Jury.

765 ence and your knowledge of human nature, and your knowledge of human events, past and present. That is particularly applicable in this case. You must use your knowledge of the motives which influence and control human action, and test the evidence in the case according to that knowledge, and render a verdict accordingly.

766 It is properly within your province in listening to the testimony of witnesses to observe their manner and bearing, their intelligence, their means of knowledge, and to take into consideration any existing bias or prejudice any witness may have or entertain, and reconcile, as far as you can, any conflicting testimony; and you have the right to believe all the testimony of a witness, or believe it in part, or you may reject it altogether, as you may find the evidence to be or to justify.

767

You are the exclusive judges of the credibility of the witnesses, and it is your duty to reconcile any conflict that may appear in the evidence.

768 You are the sole judges of all questions of fact which arise here, and you will determine those questions by careful consideration of all the evidence before you, without any direction or suggestion from the court as to the weight or value you should give to all or any part of the testimony, nor are you, in any way, to be governed in your conclusion by any opinion the court may seem to express concerning the essential facts.

Charge To Jury.

While you are in every sense the sole judges 769
 of the facts, you will necessarily look to the court
 for the application of the law to the facts as you
 find them, and you must receive and apply to the
 case such instructions upon the law as is applica-
 ble to the questions arising here, and as shall
 guide your deliberations toward a verdict in har-
 mony with the law and the evidence.

The claims of counsel have been so clearly 770
 stated that it is not my purpose to rehearse
 them.

Every man is legally bound to exercise ordi-
 nary care, so that others suffer no harm by his
 conduct or his actions. The measure of his duty
 is the circumstances of the case. What may be 771
 absolutely necessary under some circumstances to
 protect others from harm, may not be necessary
 under other circumstances.

Negligence,—which enters so largely in this
 case,—is the doing of something which under the
 circumstances and in view of the duty owed to
 endeavor to protect other people from harm by
 reason of his conduct, a reasonable and ordinarily 772
 prudent man would not do. It is the failure to
 do something which a man of good judgment and
 sound common sense would do, in view of the
 circumstances, out of a desire to perform his
 duty to protect other people from harm by reason
 of his actions.

Charge To Jury.

773 It may be defined as an omission to do something which a reasonable and prudent man, guided by those considerations which ordinarily regulate the conduct of affairs, would do, or doing something which a reasonable man would not do under all the circumstances surrounding the particular case.

774 Ordinary care and reasonable care mean such degree of care under the circumstances, and in the situation in which these parties were placed on the day and time of it, as an ordinarily prudent person would exercise under the circumstances. So that you see, gentlemen, it always depends upon the particular circumstances of each case, whether a person is negligent or exercises ordinary care.

775

The law places upon all persons the duty of exercising reasonable care to avoid injury to others, and it follows that if a person fails to exercise reasonable care and another is injured, he is guilty of negligence.

776

So, to sum up, gentlemen, it is only upon the allegation of negligence that this plaintiff can recover, and the burden of proof is upon him to establish the fact that this defendant was in some respect negligent,—in some particular guilty of negligence.

Counsel for the plaintiff has stated his claims fully as to why the defendant was guilty of negli-

Charge To Jury.

gence; he has covered his claims to include all 777
features of the case in reference to the allegations in the complaint,—that the plaintiff had no knowledge of gasoline engines or the method of operation, and no practical knowledge of the qualities of gasoline; that no instructions or warning were given him concerning the starting of the engine, and that the plaintiff was directed and instructed to start the engine as set forth and 778
as described by the witnesses, and that this was the customary practice of the defendant; that the defendant permitted a lighted lantern to come in close proximity to an open vessel containing gasoline, especially when such gasoline was being poured, which the complaint alleges is a dangerous practice, and that it was negligence on the part of the defendant to allow it to continue; that 779
gasoline throws off explosive gases which might come in contact with the lighted lamp and are liable to cause an explosion, which would communicate itself to the gasoline in the can, all of which this plaintiff was ignorant of at the time of the accident, and that by reason of the practice of the defendant,—by reason of the defendant's furnishing an engine to be started in that manner, and by reason of the defendant's failure to 780
instruct and warn the plaintiff of the dangers of such operation, and its failure to instruct him as to the proper method of operating and starting the engine, if such method existed, its failure to furnish a proper light and proper can, and that by reason of this operation being conducted in a small closed building, which should have been

Charge To Jury.

781 open, and by reason of the defective and unsafe appliances and equipment this accident was caused.

Those are the acts of negligence complained of. It is not incumbent upon the plaintiff to prove all of them. If negligence has been proven by a fair preponderance of the evidence directed upon any one of those allegations, which you, from a consideration of all the evidence, find was some negligent act,—a negligent act of omission, or a negligent act of commission,—then, of course, you will find there was negligence. If, on the other hand, you find the evidence supports the claims of counsel for the defendant,—that all of this was not a dangerous operation, that the plaintiff should be presumed to know that care was necessary in carrying through this operation which has been so many times described,—bearing in mind that the rule applicable to such question is the standard of what an ordinarily prudent man would do under the circumstances, and determine whether the railroad company was guilty of negligence, and determine whether Collins was guilty of contributory negligence.

784 Now, gentlemen, if you find there was no negligence on the part of the defendant, your verdict will be for the defendant as “No cause of action;” or, if you find the plaintiff assumed the risks incidently, naturally and normally flowing from this employment,—and whatever that employment was it is for you to determine,—he

Charge To Jury.

cannot recover; so that, if you determine either 785
one of those questions first your inquiry is ended.

On the other hand, if you find there was negligence, and there was no assumption of risk, then determine the question of whether Collins himself was guilty of contributory negligence, and in that orderly procedure I think you will have no 786
difficulty in reaching a verdict.

I am bound, before closing, however, to instruct you in reference to the rule of damages, and I say to you, if you find the issues in favor of the plaintiff, your next inquiry will be how much to award him. The question then arises what you may take into consideration in determining the amount to which he is entitled. You 787
must consider his evidence and the doctor's testimony, and from that you must decide what the facts are in reference to his injuries. You have seen him here. From all of that you will determine whether his injuries are temporary or permanent, and what injuries he has in fact suffered. Then you will, in the event of finding in his favor, fix his damages, and these cannot be determined by any definite mathematical rule. 788

In arriving at the amount you will award him you may take into consideration all the pain of body and mind he has suffered as a direct result of the injuries he received and of which he complains in his complaint, from the time of the ac-

Charge To Jury.

789 cident to the present time; all the money loss he
 has sustained, if any, by reason of physical in-
 ability to work and earn money, which was direct-
 ly caused by the injuries received in this acci-
 dent; all the pain and suffering, if any, he will
 endure in the future which directly grows out of
 his complained of injuries; all the money he will
 lose, if any, in the future by reason of physical
 790 inability to work which was directly caused by
 this accident.

The pain and suffering and the loss of earning
 power for the future must be found by you with
 reasonable certainty.

791 Take into consideration, gentlemen, all these
 elements and award him such an amount as you,
 in the exercise of good, sound judgment, shall
 determine is just compensation; and just compen-
 sation is such as would be necessary to make the
 plaintiff whole as far as the injuries he has sus-
 tained are concerned, taking into consideration
 the various elements I have mentioned, and all
 this, gentlemen, bear in mind, in the event only
 that you find in favor of the plaintiff.

792

You will not award him punitive damages,—
 that is damages by way of punishment, but you
 will take into consideration all of the elements I
 have enumerated, and in the exercise of your best
 judgment, award him such an amount as you think
 he ought to receive in order to give him just com-
 pensation, not overlooking the rule I have given

Charge To Jury.

you in reference to the offset against that amount 793
if you find the plaintiff guilty of contributory negligence.

I think, gentlemen, that this rounds out the full measure of my duty to you. I need not dwell upon the gravity of your office the serious character of the responsibility which the law imposes upon you here. You are sworn to act fearlessly and faithfully. You will leave both sympathy and sentiment, both prejudice and bias behind you when you enter your room for your deliberations. These elements are more subtle in their operations than we perhaps realize. They sometimes creep unnoticed into a fair mind, and intrude their influence when we least suspect their presence. You will guard against them here, as you will guard against any other improper consideration which may divert you from a careful, dispassionate investigation of the evidence before you, and a verdict based honestly upon your conclusions. 794 795

Let your verdict, gentlemen, whatever it may be, reflect your sound, sober, honest judgment, unwarped by any consideration which your oaths as jurors will not justify and approve. 796

I have been requested by the defendant to make certain charges—

Mr. Ryan: May I say, that in view of the charge made, all of my requests, except the first three, are withdrawn.

Requests.

797 The Court: The first request is one relating to Interstate commerce,—“That at the time of his injury the plaintiff was not employed in interstate commerce within the meaning of that term as it is used in the Federal Employer’s Liability Act.”

I will deny that request.

798 Second: “That if the plaintiff’s injury was due solely to his negligence in placing the lantern or in pouring the gasoline into the cylinder, there can be no recovery in this action.”

That is a repetition, I take it, of what I said and pre-supposes the finding of no negligence on the part of the defendant.

Third: “That there is no evidence in this case tending to show that the gasoline engine was insufficient or defective.”

799 I charge that.

Any requests on the part of the plaintiff, or exceptions?

Mr. Ward: Note an exception to the last charge that Mr. Ryan requested.

The Court: Exception noted.

800 Mr. Ryan: I desire to note an exception to the refusal to charge the first request relative to employment in interstate commerce.

The Court: Exception noted.

Mr. Ward: No other exceptions, but I desire to ask your Honor to charge that the negligence of any servant of the defendant in not instructing and warning the plaintiff, or any other of the respects enumerated by your Honor, is the negligence of the defendant, for which the defendant is answerable.

Requests.

The Court: I so charge.

801

Mr. Ryan: Exception.

Mr. Ward: I ask your Honor to charge the jury on the subject of damages, that in addition to the earning capacity, and in addition to the pain and suffering, it is their duty to award the plaintiff damages,—if he is entitled to damages,—for the disfigurement and physical impairment, if they should find that same exists.

802

The Court: For any physical impairment,—the jury should take that into consideration. I so charge.

Mr. Ryan: Exception.

Mr. Ward: Does your Honor decline as to the disfigurement?

The Court: I am in doubt about it.

Mr. Ryan: I think your Honor has fully covered it.

803

Mr. Ward: I will press my request that any disfigurement which causes the plaintiff shame and humiliation is a measure of damages.

The Court: Do you press it?

Mr. Ward: Yes, sir, I do.

The Court: Then I so charge.

Mr. Ryan: Exception.

The Court: Exception noted.

804

Jury retire for deliberation.

4:10 o'clock p. m.: Jury report a verdict in favor of the plaintiff for \$15,000.00.

MOTION FOR NEW TRIAL.

805 Proceedings, November 23rd, 1917, 10:00
o'clock a. m.

Mr. Ryan: If your Honor please, I move to set
aside the verdict of the jury in the Collins action
and for a new trial, on the ground that the verdict
is contrary to law; on the ground that it is con-
trary to the evidence; on the ground that the
806 damages are excessive, and upon the exceptions
contained in the record during the trial.

On the further ground that the jury did not re-
port in its verdict upon the question of the con-
tributory negligence of the plaintiff, and the re-
ports of the verdict, if any, should have been so
made. On the questions discussed at the trial,
and all those raised by exception, it seems to me
807 in this case the verdict of this amount is an out-
rageous one. There is not any claim that the
earning capacity of the plaintiff has been to any
extent diminished. There was a period of time
after his injury in which he had no work, but be-
fore he was injured he had in mind entering the
Federal service, and tried the Civil Service ex-
amination for it, and since his injury he has been
808 assigned to that service, and during the time he
has been employed in the Federal service he has
made more money than he made during the year
immediately preceding his accident, so that the
only element which the jury could have properly
considered is the physical impairment. Award-
ing fifteen thousand dollars for that sole element
seems to me to be a gross injustice to the defend-

Motion for New Trial.

ant, and I ask a more careful consideration of the matter on the amount of the verdict, for the reason that the power with reference to the size of the verdict is vested very largely in the Trial Court. We very likely will have to abide by the decision finally which your Honor makes on that question. 809

The Court: Anything to say, Mr. Ward?

Mr. Ward: Does your Honor desire me to discuss any particular point? 810

The Court: I will deny the motion on all the grounds, with the exception of the question of its being excessive. Upon your question of the jury not having reported with reference to the contributory negligence of the plaintiff, no interrogatories were prepared to be propounded to the jury, and in the absence of your request upon their going out, to report on that question, I think you are too late now, Mr. Ryan, and I will so rule. 811

Mr. Ryan: Your Honor can see the situation in which it is left when you come to consider whether the verdict is excessive or not. It is a matter of great importance to know whether the jury did find whether the plaintiff was guilty of contributory negligence. 812

The Court: I do not think it was upon the court to take the initiative of preparing interrogatories to be submitted to the jury. If you had prepared interrogatories to be submitted I would have submitted them.

Mr. Ryan: As I am informed, the jury found the plaintiff was guilty of contributory negli-

Motion for New Trial.

813 gence. Of course, that is an important element to be considered upon the question of whether the verdict is excessive or not, and it seems to me, without the request of the defendant's counsel, the jury should have reported the basis for its verdict.

814 Mr. Ward: The practice in this respect is uniform in the courts. I personally never knew of a jury, either in this court or in the State courts of this county, since the enactment of this statute, being required or directed in the Trial Court to find anything except a general verdict in a case of this sort.

The Court: I will deny the motion with reference to that point.

815 Mr. Ward: The question of the amount of the verdict, your Honor, I will be glad to discuss.

The Court: I think I will hear you on that because it is true, practically as Mr. Ryan has stated, that it rests very largely with this court. The Circuit Court of Appeals on appeal has many times held that it is entirely within the discretion of the Trial Court, so if any injustice has been done the defendant, this court would be the guilty party, so to speak; therefore, I will hear you upon the question of whether the damages are excessive or not.

816

Mr. Ward: Does your Honor care to hear me now?

The Court: I think perhaps I had better appoint some time; I would just as soon take it on briefs, unless you gentlemen insist upon oral argument.

Motion for New Trial.

Mr. Ryan: No, I would prefer to submit it on 817
a brief.

The Court: I think that would be a better way
and save time; no particular time would be saved
by oral argument.

Mr. Ryan: I would like a stay of 90 days within
which to file a bill of exceptions, to date from the
day when your Honor makes the order disposing
of the motion to set aside the verdict.

818

The Court: Sixty days is the regular time
with us. The record is short; if the record were
long, I would be inclined to grant 90 days.

Mr. Ryan: That is all right,—sixty days, to
date from the date when your Honor disposes of
this motion?

The Court: Yes. In view of the fact the time
that intervenes is broken up, I will give you until
the 7th, and ask you to mail them to me at Hart-
ford. Mr. Ryan may have two weeks from today
within which to put this in writing, and, Mr.
Ward, I will give you a week following that, and
if you want to take less time, all right.

819

Mr. Ryan: And if I want to file a reply to it
within two days.

The Court: Within two days, and mail them
all to me at Hartford.

820

Mr. Ryan: May I note an exception to each
ruling on denying the motion?

The Court: Yes, note an exception to the
denial of the motion.

ALLOWANCE, BILL OF EXCEPTIONS.

821

UNITED STATES DISTRICT COURT.
WESTERN DISTRICT OF NEW YORK.

WILLIAM M. COLLINS,

Plaintiff,

vs.

ERIE RAILROAD COM-
PANY,

822

Defendant.

The foregoing Bill of Exceptions, which contains all of the evidence taken and proceedings had upon the trial of this action, is correct in all respects and is hereby approved, allowed and settled and ordered filed and made a part of the record herein.

823

Dated, April 2nd 1918.

EDWIN S. THOMAS,
U. S. J.

824

MEMORANDUM ON MOTION TO SET ASIDE
VERDICT AS EXCESSIVE.

821-a

DISTRICT COURT OF THE UNITED STATES
WESTERN DISTRICT OF NEW YORK.

WILLIAM M. COLLINS,

vs.

ERIE RAILROAD COMPANY.

Civ. No. 1237.

This is a motion to set aside a verdict of \$15,000 which the plaintiff recovered for certain injuries sustained as a result of the negligence of the defendant, on the ground that the verdict was excessive.

822a-

At the time of the accident the plaintiff was twenty-one years of age, had received the equivalent of a high school education and was employed as telegraph operator and general utility man at a certain tower of the defendant, and was earning approximately from fifty-five to sixty dollars per month. His injuries consisted of severe burns extending from the top of the right ear along the right side of the face, under the chin and up on the left side of the face to the top of the left ear, and the outer lobe of one of the ears was burned off. The outer skin of the face, neck, chin and ears was badly burned and the scar tissue was crusted and hard; all the hair follicles were destroyed and the plaintiff suffered excruciating pain for a long period of time, and the doctors testified that the injuries are permanent and will cause a certain amount of physical pain during the balance of the

823-a

824-a

*Memorandum on Motion to Set Aside Verdict
as Excessive.*

821-b

plaintiff's life, and great discomfort during cold weather.

822-b

In addition to the burns on the face, neck and ears, there are severe burns upon the thumb and wrist of the right hand and some slight burns on the left hand, and the evidence tended to show that the burns on the thumb of the right hand had already contracted the thumb and it would continue to grow worse rather than better.

823-b

The jury was fully instructed with reference to the elements of damages in the main body of the court's charge. At the close of the main charge, counsel for the plaintiff requested the court to charge, that as an element of damage the jury could take into consideration the "shame and humiliation" which the plaintiff would suffer as a result of the burns above described. Some dispute arose between the stenographer and counsel for both sides as to whether—at the conclusion of the main charge—the plaintiff's counsel requested the court to further charge the jury that they could take into account "shame and humiliation" or whether it was "pain and humiliation".

824-b

The stenographer's record showed that at one time he took down "pain and humiliation" which was afterwards changed to "shame and humiliation." The court having instructed the jury in the main body of the charge that they could take into consideration "pain and suffering," the court's recollection of the special request made by counsel for

*Memorandum on Motion to Set Aside Verdict
as Excessive.*

he plaintiff was that the jury could take into consideration "shame and humiliation". Consequently, the decision upon this motion is based upon the fact that the court charged, at the request of the plaintiff's counsel, that the jury could take into consideration "shame and humiliation" as an element of damages. The better considered cases cited by counsel for both sides seem to hold that in injuries of this character the jury may take into consideration "shame and humiliation," and in view of this motion to set aside the verdict as excessive is denied.

Ordered Accordingly.

February 26, 1918.

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828

PETITION FOR WRIT OF ERROR.

UNITED STATES DISTRICT COURT.
WESTERN DISTRICT OF NEW YORK.

825

WILLIAM M. COLLINS,
Defendant in Error,
against
ERIE RAILROAD COM-
PANY,
Plaintiff in Error.

826

To the Honorable Judges of the United States
Circuit Court of Appeals for the Second Judicial
Circuit:

The Erie Railroad Company, plaintiff in error
in the above entitled action and defendant in the
court below, feeling itself aggrieved by the ver-
dict of the jury heretofore rendered in this action
for the sum of \$25,000 upon which judgment was
entered in favor of the plaintiff and against the
defendant, Erie Railroad Company, for the sum
of Fifteen thousand and forty-five and 66/100
dollars (\$15,045.66) on the 6th day of April,
1918, in the District Court of the United States
for the Western District of New York, come now
Erie Railroad Company by its attorneys, Moot
Sprague, Brownell & Marey, and complain that in
the record and proceedings had in such case, as
well as in the rendition of said verdict and mak-
ing an entry of the said judgment herein as afore-
said, divers manifest errors have happened to
the great damage of the said plaintiff in error, as
more fully appears from the assignment of er-

827

828

Petition for Writ of Error.

829 rors herewith presented and submitted by the
said plaintiff in error and filed herein.

830 WHEREFORE, said defendant Erie Railroad
Company, plaintiff in error, prays and petitions
for the allowance of a writ of error and for such
other and further order, citation and process as
may cause the said errors and each of them to
be corrected by the said United States Circuit
Court of Appeals for the Second Judicial Circuit
and this petitioner prays for a reversal of the
judgment so as aforesaid rendered and for cor-
rection of the errors so complained of and for
such other, further and proper relief as may be
just in the premises, and your petitioner will
ever pray.

831 Dated, April 11th, 1918.

ERIE RAILROAD COMPANY,
Petitioner,

By
MOOT, SPRAGUE, BROWNELL & MARCY,
Attorneys for Petitioner.

832 ENDORSED: Civil 1237—U. S. District Court,
Western District of N. Y. William M. Collins,
Defendant in Error vs. Erie R. R. Co., Plaintiff
in Error.—Petition for Writ of Error.—Moot,
Sprague, Brownell & Marcy, Attorneys for Plain-
tiff in Error, Office and P. O. Address, 302
Erie County Savings Bank Building Buffalo, N.
Y.—Filed April 12th, 1918. S. W. Petrie, Clerk.

ASSIGNMENT OF ERRORS.

UNITED STATES DISTRICT COURT.
WESTERN DISTRICT OF NEW YORK.

833

WILLIAM M. COLLINS,

Plaintiff,

against

ERIE RAILROAD COM-
PANY,

Defendant.

834

The above named Erie Railroad Company hereby makes the following assignment of errors in this action and says that in the record and proceedings herein there is manifest error in each and every of the following rulings of the court, all of which is to the prejudice of the rights of the said Erie Railroad Company, to wit:

835

I. In overruling the objection of counsel for the Erie Railroad Company to the following question asked of the plaintiff, William M. Collins, in relation to the men who were employed with him:

“Q. Which man was in charge?

Defendant’s Counsel: I object to it as incompetent, immaterial and irrelevant and calling for a conclusion of the witness.

836

The Court: Objection overruled.

Defendant’s Counsel: Exception.

Q. You may answer.

A. William Jeffries was in charge.”

II. In overruling the objection of defendant’s counsel to questions asked of the plaintiff relat-

Assignment of Errors.

837 ing to embarrassment due to disfigurement, as follows:

“Q. Tell us how your face and hands are now,—not their burns,—we can see them,—but so far as they effect your comfort?

A. They are very embarrassing to me.

838 Defendant’s Counsel: I object to it as incompetent, immaterial, irrelevant and improper, and move to strike it out.

Plaintiff’s Counsel: It is an element of damage.

The Court: Strike it out.

Plaintiff’s Counsel: Exception.

The Court: Exception noted.

Q. Do you observe, as you go about that people notice your affliction?

839 A. Yes, sir.

Defendant’s Counsel: I object to it as incompetent, immaterial, irrelevant and improper.

The Court: Objection sustained.

Defendant’s Counsel: I move to strike out.

The Court: Strike it out.

Plaintiff’s Counsel: Exception.

840 The Court: You have the exception.

Q. Do you suffer mental anguish and humiliation on account of your burns?

A. Yes, sir.

Defendant’s Counsel: I object to it on the same grounds as before, and also that it leading.

The Court: I do not think it is necessary

Assignment of Errors.

to ask a leading question there; I think one 841
question put to him would bring out what you
want.

Defendant's Counsel: The witness
answered it before the objection and ruling—

The Court: He may state the character of
any mental suffering he has endured.

Q. You may state the character of any
mental suffering you endure by reason of 842
your condition.

Defendant's Counsel: I object to it as in-
competent, immaterial, irrelevant, improper,
calling for a conclusion of the witness, and
not a proper measure of damages in this case.

The Court: Objection overruled.

Defendant's Counsel: Exception.

The Court: Exception noted.

843

Q. Answer.

A. It is very humiliating to be out in
company or any place and people noticing
you and making you feel kind of embarrass-
ed, watching you all the time." ?

III. In overruling the objection of counsel for
the defendant to the following questions asked of
the plaintiff's witness, Jeffries, relating to Jeff- 844
ries' information and to whether Jeffries impart-
ed information to the plaintiff Collins:

"Q. Do you know whether, in the opera-
tion of that engine,—whether the gasoline
volatilizes,—is turned into gas, before it is
exploded?

A. Yes, sir.

Assignment of Errors.

845 Q. Or did the gasoline explode, and turn into gas, and then the gas explode?

A. I think it must turn into gas before it explodes.

Q. You knew that?

A. Yes.

Q. Did you ever tell that to Collins?

A. No, sir.

846 Defendant's Counsel: That is objected to as incompetent, immaterial, irrelevant, improper and not within the issues of the complaint; there is no claim here that the gas in the cylinder was exploded.

The Court: I will overrule the objection.

Defendant's Counsel: Exception."

847 IV. In overruling the objection of counsel for defendant to the following questions asked of the plaintiff's witness, Jackson, with reference to the action of gasoline under certain conditions:

848 "Q. Supposing you have a closed room, the size of that jury box, and you have gasoline fumes in that room,—the room heated with artificial heat in the winter time—if you have gasoline fumes in that room, is the tendency of those gasoline fumes to explode increased by opening the door?

Defendant's Counsel: I object to it as incompetent, immaterial, irrelevant and improper; it does not state the conditions as they existed at the time; and on the ground that it is a question for the court and jury and not for expert testimony.

Assignment of Errors.

Q. I should not have said opening the 849
door; is the tendency increased by a partial-
ly open door into the outer air—a door open
six inches?

Defendant's Counsel: Same objection as
before.

The Court: I think there is some objection
to it on the ground that it is a little indefi-
nite; perhaps you can incorporate more of 850
the actual facts as they already appear in
the evidence, in a hypothetical question,—if
that is what it is.

Plaintiff's Counsel: I will withdraw the
question.

Q. Assuming that gasoline is being pour-
ed in a warm room, and that gasoline is being
poured out of a can,—which had previously 851
been pumped into the can through a little pet
cock at the end of a cylinder, which has to be
forced by a pump, and then that gasoline is
taken and slowly poured into a hole in the
cylinder, and some of that gasoline doesn't
quite hit the hole, but spatters and runs
over; the first assumption is, would that be
likely to produce fumes?

A. Yes, sir. 852

Defendant's Counsel: Same objection, on
the same grounds as to the other hypothetical
question; also, that it is indefinite.

The Court: Objection sustained. Strike
out the answer. Your assumptions are not
definite according to the evidence. Try it
again.

Assignment of Errors.

853

Q. Assuming that gasoline is drawn from a pet cock into the can, Exhibit #1, (shows) a small room—a heated room; that the gasoline is then poured slowly into the hole, and that some of it passed into the hole,—most of it,—and perhaps some is spattered around in the vicinity of the hole; without going any further than that, would that performance, in your opinion, create fumes of gasoline?

854

Defendant's Counsel: Objected to on the same grounds as before, including the grounds stated by the court, that it is not definite and in accordance with the evidence.

The Court: Objection overruled.

Defendant's Counsel: Exception.

A. It would; the gasoline would be vaporized and turned into a gas.

855

Q. Where would those fumes,—assuming the air in the room was still,—no air movement,—where would the fumes go?

Defendant's Counsel: Objected to on the same grounds as before.

The Court: Overruled.

Defendant's Counsel: Exception.

A. They would fall or lie on the floor.

856

Q. If there was, within a foot or two of the ground, a lighted lantern with a glass globe, metal top and bottom, an ordinary railroad lantern—you are familiar with them?

A. Yes, sir.

Q. Assuming there was such lantern, and there was also a lighted stove—a burning

Assignment of Errors.

stove six or seven feet away,—a lighted stock 857
 in this same room,—10 x 14, dimensions of
 the room— would those fumes have a ten-
 dency to explode if brought into contact with
 the lantern or stove?

Defendant's Counsel: Objected to on the
 same grounds as before, and assuming facts
 for which no testimony has been given.

The Court: Overruled. 858

Defendant's Counsel: Exception.

A. Under proper conditions; yes, sir.

Q. Under what conditions?

Defendant's Counsel: Objected to on the
 same grounds as before stated.

The Court: Overruled.

Defendant's Counsel: Exception.

A. That enough oxygen from the air 859
 would be admitted—combined with the fumes
 to produce an explosion.

Q. Supposing you have got an ordinary
 railroad lantern burn—what would be the
 effect of spattering drops of gasoline on the
 globe or top of it?

Defendant's Counsel: Objected to on the
 same grounds as before, and no foundation
 laid for the question. 860

The Court: Overruled.

Defendant's Counsel: Exception.

A. The gasoline would immediately be
 turned into a vapor."

V. In denying the motion for nonsuit by the
 Erie Railroad Company as follows:

Assignment of Errors.

861

“Defendant’s Counsel: Defendant moves for a nonsuit, on the ground that at the time of the plaintiff’s injury the plaintiff was not employed in interstate commerce, within the meaning of that term as used in the Federal Employer’s Liability Act, and that, therefore, this court has no jurisdiction of this action.

862

Second: On the ground that the testimony shows that plaintiff’s injury was due solely to his own negligence.

Third: On the ground that there is no evidence in this case, or anything to show, that defendant was negligent.

Fourth: On the ground that the testimony shows that the plaintiff, as a matter of law, assumed the risks of the injury which he received.

863

We have this briefed up, and I do not think there is any necessity for oral argument.

864

The Court: I have carefully examined the demurrer and the points raised, and Judge Hazel’s memorandum on the demurrer, and have made an examination of the cases myself, touching this question of law which you raise, and I feel that I will deny the motion. You have the exception. On the other grounds,—I think I will overrule those grounds and deny the motion; you have the exception to that also.

Defendant’s Counsel: Exception to the denial of the motion.”

VI. In denying the motion for a nonsuit and in denying the motion for a direction of a verdict

Assignment of Errors.

in favor of the defendant, made by the Erie Railroad Company at the close of all the evidence, as follows: 865

“Defendant’s Counsel: I renew the motion made at the close of the plaintiff’s case, on all the grounds stated at that time—on the motion for a nonsuit, and on the same grounds I ask your Honor to direct a verdict in favor of the defendant of ‘No Cause of Action.’ 866

The Court: Motion denied.

Defendant’s Counsel: Exception. That is each motion is denied, and I have the exception to each denial?

The Court: Yes.”

VII. In the refusal of the court to charge the jury as requested by counsel for defendant— 867
 “That at the time of his injury the plaintiff was not employed in interstate commerce within the meaning of that term as it is used in the Federal Employer’s Liability Act”, to which refusal defendant duly excepted.

VIII. In charging the jury, at the request of counsel for plaintiff, as follows: 868

“Plaintiff’s Counsel: No other exceptions, but I desire to ask your Honor to charge that the negligence of any servant of the defendant in not instructing and warning the plaintiff, or any other of the respects enumerated by your Honor, is the negligence of the defendant, for which the defendant is answerable.

Assignment of Errors.

869 The Court: I so charge.
 Defendant's Counsel: Exception."

IX. In charging the jury, at the request of counsel for the plaintiff, as follows:

870 "Plaintiff's Counsel: I ask your Honor to charge the jury on the subject of damages, that in addition to the earning capacity, and in addition to the pain and suffering, it is their duty to award the plaintiff damages,—if he is entitled to damages,—for the disfigurement and physical impairment, if they should find that same exists.

 The Court: For any physical impairment,—the jury should take that into consideration. I so charge.

871 Defendant's Counsel: Exception.
 Plaintiff's: Counsel: Does your Honor decline as to the disfigurement?

 The Court: I am in doubt about it.

 Defendant's Counsel: I think your Honor has fully covered it.

872 Plaintiff's Counsel: I will press my request that any disfigurement which causes the plaintiff shame and humiliation is a measure of damages.

 The Court: Do you press it.

 Plaintiff's Counsel: Yes, sir, I do.

 The Court: Then I so charge.

 Defendant's Counsel: Exception.

 The Court: Exception noted."

WHEREFORE, the said Erie Railroad Company prays that the judgment entered in this

Assignment of Errors.

case in the office of the Clerk of the United States District Court for the Western District of New York on the 6th day of April, 1918, for \$15,045 66/100 be reversed and that the said District Court be directed to grant a new trial of said cause, and for such other and further relief as may be proper. 873

Dated, Buffalo, N. Y., April 11, 1918. 874

MOOT, SPRAGUE, BROWNELL & MARCY,
Attorneys for Defendant,
Erie Railroad Company.

(ENDORSED): U. S. District Court, Western District of N. Y. William M. Collins, Defendant in Error vs. Erie R. R. Co. Plaintiff in Error. Moot, Sprague, Brownell & Marey, Attorneys for Plaintiff in Error. Office and P. O. Address 302 Erie County Savings Bank Building, Buffalo, N. Y. Filed April 12, 1918. S. W. Petrie, Clerk. 875

876

UNDERTAKING ON APPEAL.

877 IN THE DISTRICT COURT OF THE UNITED STATES.

FOR THE WESTERN DISTRICT OF NEW YORK.

878 WILLIAM M. COLLINS,
Plaintiff,
 against
 ERIE RAILROAD COMPANY,
Defendant.

879 KNOW ALL MEN BY THESE PRESENTS,
 That the AMERICAN SURETY COMPANY
 OF NEW YORK is held and firmly bound unto
 the above named plaintiff, WILLIAM M. COL-
 LINS, in the sum of ----- TWO HUNDRED
 AND FIFTY (\$250.00) DOLLARS.....law-
 ful money of the United States of America, to
 be paid unto the said WILLIAM M. COLLINS
 for the payment of which well and truly to be
 made the said AMERICAN SURETY COM-
 PANY OF NEW YORK binds itself, its succes-
 sors and assigns firmly by these presents.

880 SEALED with our seals and dated this 12th
 day of April, 1918.

WHEREAS, the above named defendant,
 ERIE RAILROAD COMPANY is about to sue
 out a writ of error to the United States Circuit
 Court of Appeals for the Second Judicial Cir-
 cuit, to reverse the judgment in the above entitled

Undertaking on Appeal.

action in favor of the above named plaintiff 881
 against the above named defendant in the sum of
 fifteen thousand and forty-five and 66/100 dol-
 lars (\$15,045.66) entered in the office of the Clerk
 of the U. S. District Court for the Western Dis-
 trict of New York on the 6th day of April, 1918.

NOW, THEREFORE, the condition of this
 obligation is such that if the above named ERIE 882
 RAILROAD COMPANY shall prosecute the said
 writ of error to effect and answer all costs if it
 shall fail to make good its plea, then this obliga-
 tion to be void, otherwise to remain in full force
 and virtue.

AMERICAN SURETY COMPANY

OF NEW YORK,

Corporate
 Seal

By Herbert L. Hart,
Resident Vice President.

883

Attest:

Walter E. Schaefer,
 Resident Assistant Secretary.

I hereby approve of the within undertaking 884
 both as to form and manner of execution and the
 sufficiency of the surety therein contained.

Dated, April 12, 1918.

JOHN R. HAZEL,
D. J.

Undertaking on Appeal.

885 (ENDORSED): In the District Court of U. S., Western District of N. Y. William M. Collins Plaintiff vs. Erie R. R. Co., Defendant—Bond on Appeal. Moot, Sprague, Brownell & Marey, Attorneys for Defendant, Office & P. O. Address 302 Erie County Bank Building, Buffalo, N. Y. Filed April 12, 1918. S. W. Petrie, Clerk.

886

State of New York,	} ss.:
Erie County,	
City of Buffalo.	

887 On the 12th day of April, in the year 1918, before me personally came Herbert L. Hart, to me known, who, being by me duly sworn, did depose and say: That he resides in the City of Buffalo, N. Y.; that he is the resident vice president of the AMERICAN SURETY COMPANY OF NEW YORK, the corporation named in and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal, that it was so affixed by order of the Board of

888 Directors of said corporation and that he signed his name thereto by like order; and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in Section 183 of Chapter 28 of the consolidated laws known as the insurance law. And the said Herbert L. Hart further said that he is acquainted with Walter E. Schaefer and knows him to be resident as-

Undertaking on Appeal.

sistant secretary of said company; that the signature of the said Walter E. Schaefer subscribed to the said instrument is in the genuine handwriting of the said Walter E. Schaefer, and was subscribed by the like order of the said board of directors, and in the presence of him, the said Herbert L. Hart. 889

MARIE A. PFERD.

890

Form G 362

Incorporated April 14, 1884

AMERICAN SURETY COMPANY
of New York.

GENERAL OFFICES, 100 BROADWAY.

Financial Statement, December 31, 1917.

RESOURCES.

891

Real Estate,

Home Office, Building and

Land, unencumbered ---\$ 3,200,000.00

N. Y. City Water Front,

unencumbered ----- 215,000.00

Appraised value by N. Y.

Insurance Dept. 3,415,000.00 \$3,166,047.91

Stocks and Bonds, Market Value ----- 4,555,616.00

Special Reserve Fund Investment ----- 250,000.00

Mortgage and Collateral Loans ----- 785,196.04

Cash in Banks and Offices ----- 688,175.23

Excise Reinsuring Fund ----- 73,794.59

Premiums in Course of Collection ----- 776,266.18

Accrued Interest and Rents ----- 57,963.15

Balance Recoverable ----- 109,913.17

\$10,462,972.27

892

Undertaking on Appeal.

893

LIABILITIES.

Capital Stock -----	\$5,000,000.00
Surplus and Undivided Profits -----	709,593.58
Special Reserve -----	250,000.00
Reserve for Unearned Premiums -----	2,662,043.23
Reserve for Outstanding Premiums -----	369,499.86
Reserve for Contingent Claims -----	1,046,147.69
894 Reserve for Expenses and Taxes -----	312,500.00
Reinsurances and Accounts Payable, not due --	34,272.49
Premiums Paid in Advance -----	78,915.42
	<hr/>
	\$10,462,972.27

Special Deposits, required by insurance laws of various states, not considered.

895

State of New York, }
 County of New York. } ss.:

896

H. M. GOFF, being duly sworn, says: That he is an assistant secretary of the American Surety Company of New York; that said company is a corporation duly created, existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has duly complied with all the requirements of the laws of said state applicable to said company, and is duly qualified to act as surety under such laws; that said company has also duly complied with and is duly qualified to act as surety under the Act of Congress of August 13,

Undertaking on Appeal.

1894, entitled "An Act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon," as amended; that the within is a true copy of the last statement of the assets and liabilities of said company as rendered pursuant to Section 4 of said Act of Congress; that said statement is true and that said American Surety Company of New York is worth more than \$5,000,000 over and above all its debts and liabilities and such exemptions as may be allowed by law. 897 898

H. M. GOFF.

Subscribed and sworn to before me
this 22nd day of January, 1918.

W. C. Lloyd,

Notary Public, Kings County. 899

Ctf. filed in N. Y. Co., N. Y. Co. No. 34,
Kings Co. No. 19, Kings Co. Reg. No.
8021.

N. Y. Co. Reg. No. 8059.

Certificates filed in all counties.

Term expires March 30th, 1918.

Form G 337—30M 900

Extract from the Record Book of the Board of
Trustees of the
**AMERICAN SURETY COMPANY OF NEW
YORK.**

The first meeting of the Board of Trustees of
the **AMERICAN SURETY COMPANY OF**

Undertaking on Appeal.

901 NEW YORK, after the annual Stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Tuesday, January 15, 1918, at twelve o'clock noon.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees,

902 AMERICAN SURETY COMPANY OF NEW YORK.

"Gentlemen:

"The Committee appointed by the Executive Committee of this Company, at their meeting held Tuesday, December 11, 1917, for the purpose of nominating * * * Officers of the Company, * * * for the ensuing year and until their successors are elected, beg leave to report as follows:

903 "We nominate for * * * * *

Place	Resident Vice Presidents	Resident Assistant Secretaries
Buffalo,	Herbert L. Hart	H. L. Hart
N. Y.	Robert S. Donaldson	G. A. McClanathan
	Walter E. Schaefer	Walter E. Schaefer
	Walter E. Schmieding	Walter E. Schmieding
	Percy G. Lapey	
	George W. Spitzmiller	

904 * * * * *

"WHEREUPON, it was

"RESOLVED, That the secretary be authorized to cast one ballot on behalf of the Trustees present, for the members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, Officers and Counsel, as recommended by the Nominating Committee for the ensuing year and until their

Undertaking on Appeal.

successors are elected; which was done, and there- 905
upon the aforementioned persons were declared
to have been unanimously elected to their re-
spective offices for the ensuing year and until
their successors are elected.

“The following resolution was adopted:

“RESOLVED, That the Resident Vice Presi- 906
dents be and they hereby are, and each of them
is hereby, authorized and empowered to execute
and to deliver and to attach the seal of the com-
pany to any and all obligations for or on behalf
of the Company, such obligations however, to
be attested in every instance by a Resident As-
sistant Secretary.”

State of New York, }
County of New York. { ss.: 907

I, W. H. RILEY, Assistant Secretary of the
AMERICAN SURETY COMPANY OF NEW
YORK, do hereby certify that I have compared
the foregoing extracts and transcripts, from the
Record Book of the Board of Trustees of the
AMERICAN SURETY COMPANY OF NEW
YORK, with the original record of said Board, 908
and that the same are correct extracts and tran-
scripts therefrom as they appear of record and
are set forth and contained in said Record Book;
and I further certify that I have compared the
foregoing resolutions with the originals thereof,
as recorded in the Minute Book of said Company,
and do certify that the same is a correct and true
transcript therefrom, and of the whole of said

Order Allowing Writ of Error.

909 original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 16th day of January, 1918.

W. H. RILEY,
Assistant Secretary.

910

ORDER ALLOWING WRIT OF ERROR.

At a Stated Term of the District Court of the United States, held in and for the Western District of New York, at the General Post Office Bldg., in the City of Buffalo and State of New York on the 12th day of April, 1918.

911

Present: Hon. John R. Hazel,
District Judge.

DISTRICT COURT OF THE UNITED
STATES.

FOR THE WESTERN DISTRICT OF NEW YORK.

912

WILLIAM M. COLLINS,	}
<i>Plaintiff,</i>	
against	
ERIE RAILROAD COMPANY,	
<i>Defendant.</i>	}

Upon reading and filing the petition of the defendant, Erie Railroad Company, dated April

Order Allowing Writ of Error.

11, 1918, for a writ of error herein, and the assignment of errors of said defendant herewith filed, and upon all the papers and proceedings herein; and the said plaintiff in error, Erie Railroad Company, having filed a good and sufficient bond for the sum of \$250.00 that it will prosecute the writ of error to effect and if it fail to make good its plea shall answer all costs and said security having been duly approved by the court; 913
now 914

ON MOTION of Moot, Sprague, Brownell & Marey, attorneys for Erie Railroad Company, defendant herein,

IT IS ORDERED, that a writ of error be and the same hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Second Judicial Circuit the judgment heretofore made and entered herein on the 6th day of April, 1918. 915

JOHN R. HAZEL,
*Judge District Court of U. S.,
Western District of New York.*

(ENDORSED): 1237—U. S. District Court, 916
Western District of N. Y. Wm. M. Collins, Defendant in Error vs. Erie R. R. Co., Plaintiff in Error—Order Allowing Writ of Error. Moot, Sprague, Brownell & Marey, Attorneys for Defendant, Office and P. O. Address, 302 Erie County Bank Building, Buffalo, N. Y. Filed April 12, 1918—S. W. Petrie, Clerk.

WRIT OF ERROR.

917 United States of America, ss.:

The President of the United States, to the Honorable John R. Hazel, Judge of the U. S. District Court for the Western District of New York; GREETING:

918 Because in the record and proceedings as also
in the rendition, making and entry of the judgment in favor of the plaintiff and against the defendant, Erie Railroad Company, for the sum of \$15,046.66 on the 6th day of April, 1918, in the United States District Court for the Western District of New York, before you in an action wherein William M. Collins was plaintiff and Erie Railroad Company was defendant, manifest error hath happened to the great damage of the said defendant,
919 Erie Railroad Company, as by its petition, complaint and assignment of errors appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the United
920 States Circuit Court of Appeals, for the Second Judicial Circuit, together with this writ, so that you have the same at the Borough of Manhattan, City of New York, County and State of New York, on the 12th day of May, 1918, in the said Circuit Court of Appeals for the Second Judicial Circuit to be then and there held; that the record and proceeding aforesaid being inspected;

Citation.

the said Circuit Court of Appeals for the Second Judicial Circuit may cause further to be done therein to correct those errors what of right and according to the laws and customs of the United States should be done. 921

WITNESS, the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States this 12th day of April, in the year one thousand, nine hundred and eighteen. 922

Seal of the Court. S. W. PETRIE,
*Clerk of the U. S. District
 Court for the Western
 District of New York.*

(ENDORSED): U. S. District Court, Western District of New York—William M. Collins vs. Erie R. R. Co.—Original Writ of Error—Moot, Sprague, Brownell & Marey, Office & P. O. Address, 302 Erie County Bank Building, Buffalo, N. Y. Filed April 12, 1918—S. W. Petrie, Clerk. 923

CITATION.

United States of America, ss.: 924

*The President of the United States of America,
 to William M. Collins, Defendant in Error, and
 Hamilton Ward, his attorney; GREETING:*

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at the United States

Citation.

- 925 Circuit Court of Appeals for the Second Judicial
Circuit, to be held at the Borough of Manhattan
in the City, County and State of New York, on the
12th day of May, 1918, pursuant to a Writ of
Error filed in the office of the Clerk of the United
States District Court for the Western District
of New York on the 12th day of April, 1918,
wherein the Erie Railroad Company is plaintiff
926 in error and William M. Collins the defendant in
error, to show cause, if any there be, why the
judgment, record and proceedings in said writ
of error mentioned should not be corrected and
speedy justice should not be done to the parties
in that behalf.

- WITNESS, the Honorable Edward Douglass
White, Chief Justice of the Supreme Court of
927 the United States of America this 12th day of
April, 1918.

(Seal of the Court). JOHN R. HAZEL,
*U. S. District Judge, Sitting in
the District Court.*

- S. W. Petrie,
Clerk of the U. S. District
928 Court for the Western Dis-
trict of New York.

(ENDORSED): U. S. District Court, Western
District of N. Y.—William M. Collins, Plaintiff
vs. Erie R. R. Co., Defendant. Original Citation
—Moot, Sprague, Brownell & Macey, Attorneys
for Defendant, 302 Erie County Savings Bank

Stipulation.

Buffalo, N. Y.—Due and personal service of the 929
 within Citation is hereby admitted this 13th day
 of April, 1918. Hamilton Ward, Attorney for
 Plaintiff.

STIPULATION.

UNITED STATES DISTRICT COURT. 930
 WESTERN DISTRICT OF NEW YORK.

WILLIAM M. COLLINS,
Defendant in Error.

VS.

ERIE RAILROAD COMPANY,
Plaintiff in Error.

931

IT IS HEREBY STIPULATED, by and be-
 tween the respective parties to the above entitled
 proceedings that the foregoing copies of the sum-
 mons, complaint, demurrer, opinion, order over-
 ruling demurrer, answer, clerk's minutes of trial,
 order denying motion for new trial, judgment,
 bill of exceptions, order allowing bill of excep-
 tions, petition for writ of error, assignment of 932
 errors, bond, order allowing writ of error, cita-
 tion and all other papers and documents in the
 foregoing case contained, are true and correct
 transcripts and copies of and from the originals
 now on file in the office of the Clerk of the United
 States District Court for the Western District of
 New York and a true transcript of the record as
 agreed on by the parties and may stand on ap-

Stipulation.

933 peal with the same force and effect as if certified
by the clerk of said court of said district, and

934 IT IS FURTHER STIPULATED, that any
and all of the petitioner's exhibits or the exhibits
of any of the parties hereto whether printed in
this record or not may be produced and used up-
on the argument of this appeal with the same
force and effect as if set forth in this printed rec-
ord on appeal.

Dated, Buffalo, N. Y., May 6, 1918.

MOOT, SPRAGUE, BROWNELL & MARCY,
Attorneys for Plaintiff in Error,
Office & Post Office Address,
302 Erie County Bank Bldg.,
935 Buffalo, N. Y.

HAMILTON WARD,
Attorney for Defendant in Error,
Office & Post Office Address,
104-105 Erie Co. Bank Bldg.,
Buffalo, N. Y.

CLERK'S CERTIFICATE.

United States of America, } 937
 Western District of New York. } ss.:

I, SIDNEY W. PETRIE, Clerk of the District Court of the United States of America, for the Western District of New York, Do Hereby Certify that the foregoing and annexed printed copy has been presented to me with stipulation by the attorneys for the parties, and that such printed copy is a true transcript of the record on writ of error from the United States Circuit Court of Appeals, Second Circuit, to review a judgment of the United States District Court, for the Western District of New York, in the action in said District Court, entitled William M. Collins, plaintiff, against Erie Railroad Company, defendant, as agreed on by the parties, and I certify the same to be the transcript of record on said review. 938

In testimony whereof, I have caused the seal of said court to be affixed at the City of Buffalo in said District, this 6th day of May, 1918.

(Seal of the Court).

S. W. PETRIE,
*Clerk of the United States
 District Court, for the
 Western District of New York.*

940

United States Circuit Court of Appeals

For the Second Circuit

No. 40—October Term, 1918

Argued November 7, 1918.

Decided January 30, 1919

ERIE RAILROAD COMPANY,

Plaintiff-in-Error,

AGAINST

WILLIAM M. COLLINS,

Defendant-in-Error.

In Error to the District Court of the United States for the Western District of New York.

Before

ROGERS, HOUGH and
MANTON,

Circuit Judges.

MOOT, SPRAGUE, BROWNELL & MARCY, *Attorneys for Plaintiff-in-Error.*

JOHN W. RYAN, *of Counsel.*

HAMILTON WARD, *Attorney for Defendant-in-Error.*

IRVING W. COLE, *of Counsel.*

This cause comes here on a writ of error to the United States District Court for the Western District of New York.

The action is brought under the Federal Employers' Liability Act to recover damages for personal injuries which defendant-in-error, hereinafter called plaintiff, is alleged to have suffered because of the negligence of the plaintiff-in-error, hereinafter called defendant.

The plaintiff recovered a verdict for \$15,000 and judgment has been entered in his favor for \$15,045.66.

Rogers, Circuit Judge.

The plaintiff when seventeen years old entered defendant's service in January, 1912, and for a time served as a ticket seller and night telegraph operator at a small

village in the State of New York. On December 21, 1915, he was put in charge of a signaling tower and water tank. The tower was used for the operation of the interstate and intrastate trains of the defendant. The tank was used for the purpose of supplying water to the engines of such trains. It was the plaintiff's duty to report the trains as they went back and forth by the tower to the dispatcher in Buffalo. In case a train wanted to go on the siding the dispatcher notified plaintiff to put the train on the siding, and it was necessary for him to walk down the track four or five rods and throw the switch, and walk up the track about the same distance and throw another switch. The tower was equipped with telegraph and telephone instruments. About twenty-five freight trains a day took water at the water tank and seven or eight engines exhausted the water which the tank held at any one time. The water in the tank came from a close by well, being forced from it into the tank by a pump operated by a gasoline engine which the plaintiff ran.

The defendant claims that this action cannot be maintained because the plaintiff at the time of his injury was not employed in interstate commerce within the meaning of the Federal Employers' Liability Act. This question must be first determined for if not within the act the court below was without jurisdiction, and judgment must be reversed. The question was raised by a motion for a non-suit at the close of plaintiff's case, which motion having been denied was renewed at the close of all the evidence and again by defendant's request to charge, exceptions being duly taken.

The character of the plaintiff's employment at the time of his injury, whether interstate or intrastate, depends upon the character of the work in which he was at that time engaged.

At the time of the injury the plaintiff was employed in pumping water from the earth into a tank one thousand feet distant from which it would flow into locomotives, some of which as before indicated were engaged in interstate commerce. After the water reached the tank the work of taking it into the engines was done by the engine crew.

In *Pedersen vs. Delaware, Lackawanna & Western R. Co.* 229 U. S., 146, the plaintiff was an iron worker employed by the

defendant. At the time of his injury he was carrying a sack of bolts or rivets from a tool car to the bridge, to be used the next morning in work on the bridge. The court held that the plaintiff in that case was at the time of his injury engaged in work so closely related to interstate commerce as to be in practice and in legal contemplation a part of it. The point was made that the man was not at the time of his injury actually engaged in removing the old girder from the bridge and inserting the new one, but was merely carrying to the place where that work was to be done some of the materials to be used therein. This view of the matter the court declined to take, saying: "It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work." And so in the case at bar it was necessary to the operation of defendant's trains that the engines which haul its cars should be furnished with water and the plaintiff in the act of pumping the water into the tank which was to supply the engines, was, as in the Pedersen case, carrying to the place where the engines were to be filled "the materials to be used therein." And if the bolts not yet driven into the bridge and not in the act of being driven in are an instrumentality of interstate commerce so is the water not yet put into the boilers of the locomotives and not in the act of being placed therein but which is in the act of being taken to where it is at once to be so used and not on the next day as in the Pedersen case.

The defendant, however, relies on the case of *Delaware, Lackawanna & Western Railroad Company vs. Yourkonis*, 238 U. S., 439. In that case the plaintiff at the time of his injury was engaged in preparing and setting off a charge of dynamite for the purpose of blasting coal and the explosive gases which had accumulated at the place where he was working suddenly ignited and exploded and caused a squib attached to a charge of dynamite to catch fire and explode the dynamite which caused the injuries for which the suit was brought. The plaintiff was employed in mining coal in the railroad company's colliery in the State of Pennsylvania, which coal was mined for use by it in the locomotives and engines used in its business as a common carrier in interstate commerce. The Supreme Court held that

it conclusively appeared that the injury did not occur in interstate commerce. "The mere fact," said the court, "that the coal might be or was intended to be used in the conduct of interstate commerce after the same was mined and transported did not make the injury one received by the plaintiff while he was engaged in interstate commerce." And in the case at bar it was urged at the argument that upon principle we must conclude that the plaintiff who at the time of his injury was engaged as we have said in pumping water from the earth, has no closer relationship to interstate commerce than had the plaintiff in the above case who was mining coal which might be used in interstate commerce. "If a railroad company," counsel argued, "employed an engineer to pump water from the earth at a distance from its right-of-way and transported the water by cars or a pipe line to a water tank upon its right-of-way, for use there upon engines engaged in interstate commerce, we would have a situation exactly like the one presented to the court in the Yourkonis case." That is not a fair statement of the case. In the latter case the plaintiff had no interstate employment but was employed simply in mining coal at the mines, the use of which in interstate commerce was neither certain nor immediate. In the case at bar the plaintiff had an interstate employment in caring for and operating a plant consisting of a tower house and instrumentalities therein, and the pump and the engine and the tank, all of which were permanent instrumentalities of interstate commerce. And the water unlike the coal being mined was for immediate use in interstate commerce. In order that interstate commerce might be carried on it was necessary that there should be a water tank and that it should be kept supplied with water for the interstate engines, and that there should be a pump house and a pump and a gasoline engine for the purpose of keeping the tank supplied with water without which the interstate engines could not continue their interstate functions. All these things were necessary incidents of the interstate commerce in which the defendant was engaged. The water tank, the pump house, the pump and the gasoline engine used for the purpose of keeping the water tank supplied with water were, under the circumstances, just as essential to the practical operation of the de-

fendant's interstate commerce business as the tracks over which its trains were propelled. In filling the water tank for the immediate use of locomotives engaged in interstate commerce the plaintiff was engaged in work so closely related to interstate commerce as to be practically a part of it. And that is sufficient to bring the case within the terms of the Federal Employers' Liability Act, *Delaware, Lackawanna & Western R. Co. vs. Shanks*, 239 U. S., 556, 559.

It is said that this case is ruled by the case of the *Chicago, Burlington & Quincy Railroad Company vs. Harrington*, 241 U. S., 177. In that case a wife brought the action to recover damages for the death of her husband who was a member of a switching crew employed by the railroad company in its terminal yards at Kansas City, which is an important center for the handling of interstate and intrastate commerce, and where locomotives and cars used in both kinds of traffic are received, sent out, cared for and repaired in the yards. At the time of his death Harrington was engaged in switching coal belonging to the railroad company, and which had been standing on a storage track for sometime, to the coal shed, where it was to be placed in bins or chutes from which it was to be supplied as needed to locomotives of all classes whether used in interstate or intrastate traffic. The court held that Harrington while engaged in the moving of the coal from the storage tracks was not engaged in interstate commerce, and in so holding declared that the case was not distinguishable in principle from the *Yourkonis* case, *supra*. We see no distinction between the facts in the Harrington case and the facts in the *Yourkonis* case. In the *Yourkonis* case the coal in the act of being mined had not yet become an instrumentality of interstate commerce. And after coal has been mined and while it is being carried from one State into another it is in interstate commerce. It ceases to be in such commerce when it reaches its destination and is left on the storage tracks for sometime as in the Harrington case. Then the coal being out of interstate commerce does not again get into interstate commerce by the mere act of being moved from the storage tracks to another place on the tracks in front of the coal chutes. That was the act Harrington performed. The coal was still to be unloaded into the chutes and with that act

Harrington was not engaged. In unloading the coal into the chute from which it was to be taken by the locomotives in interstate and intrastate commerce it became converted into an instrumentality of interstate commerce. The act of putting the coal into the chutes from which the engines can take it is an act performed in interstate commerce as much so as is the act of putting water into the trough by the side of the tracks to be scooped by passing engines. And we cannot distinguish the act of putting the coal into the coal chutes for the supply of the engines from the act of putting rails alongside of a track into which they are to be fitted or the bolts by the side of the bridge as in the Pedersen case. If we had the right to question, as of course we have not, the correctness of those decisions we have no disposition to do so. But we think the cases are distinguishable from the case at bar.

In *Roush vs. Baltimore & Ohio R. Co.*, 243 Fed., 712, District Judge Westenhaver, held, in a well considered opinion, that an employee of an interstate railroad company, engaged in operating a pumping station furnishing water indiscriminately and contemporaneously to locomotives engaged in interstate and intrastate commerce, is within the Federal Employers' Liability Act being engaged at the time of the accident in interstate transportation or in work so closely related thereto as to be practically a part thereof.

In *Horton vs. Oregon W. R. & N. Company*, 72 Wash., 503, an engineer at a station engaged in pumping water to be used by either intrastate or interstate commerce, as the business exigencies of the defendant required, was declared to be engaged in interstate commerce. The court answering the objection that he was not engaged in interstate commerce, said: "Was the relation of his employment such that an injury to him tended to delay or hinder the movement of trains engaged in such commerce? There is but one answer to the question. Water to supply the engines pulling such trains had to be pumped as a necessary incident to the movement of trains. If, when he was killed, his place had not been supplied by another, the movement of trains engaged in interstate commerce conducted by the master as well as the local trains, must have ceased altogether. * * * There can be no possible distine-

tion in the relation to interstate commerce between the employment of the fireman who stokes the engine hauling the train so engaged, and that of the man who pumps the water for the same engine. The engine would not run without the service of either. If there is a distinction, it is too fine spun and diaphanous for ordinary perception. To hold that there is any material distinction would be as unjust as artificial. • • •

In the *Matter of Guida*, 183 App. Div. (N. Y.), 822, a railroad company maintained boilers at a place in which it produced steam necessary to operate electricity producing machinery from which it supplied power to both intrastate and interstate trains. A laborer injured while removing soot from one of the boilers was held to be engaged in interstate commerce. The case has been affirmed by the Court of Appeals without opinion in 224 N. Y., 174.

It is said that the plaintiff as a matter of law assumed the risk of the injury which he received. The rule of the common law is that an employee assumes the risk of the ordinary dangers of the occupation into which he enters, and also those which are known or so plainly observable that he may be presumed to know them. The Federal Employers' Liability Act in Sec. 4 abolishes the doctrine of assumption of risk in cases falling under that section, and the case at bar is not within the provision of that section. So that the doctrine is still applicable to the facts of this case. *Seaboard Air Line vs. Horton*, 233 U. S., 492.

But a servant does not assume risks due to the negligence of his employer and fellow employees unless they are obvious or fully known and appreciated by him. *Boldt vs. Pennsylvania Railroad Company*, 245 U. S., 441. And the question of assumption of risk is one of fact for the jury. *Chesapeake & Ohio Railway Company vs. De Atley*, 241 U. S., 310, 318. It was properly submitted to the jury in this case and their action respecting it is not to be disturbed.

The defendant insists that there is no testimony in the case which tends to show negligence on its part. In our opinion the testimony is such as clearly justified the submission of the case to the jury. The defendant put this young man of 21 years of age in charge of a gasoline engine without information as

to the dangers incident to its operation. The plaintiff told the man who had previously been in charge that he did not even know how to set the engine going and he asked him to explain that part of the business to him. The accident happened the first night he undertook to operate the engine after the former employee had shown him how, and he says he set the engine going in the same way he had seen it done four days before. He was never told that gasoline fumes seek lower levels and while he knew that gasoline was explosive he did not know that the vapor from it was explosive. He had no knowledge or appreciation of the danger of pouring gasoline near a lantern or any fire. The jury had a right to conclude that it was negligence for the defendant to permit the plaintiff to do the work he had to do with this gasoline engine without any previous knowledge, instructions or warnings as to these things and without so much as inquiring whether he knew anything about them, or even whether he knew how to start the engine running. Neither the age, education or experience of this plaintiff were such that the defendant had any right to presume knowledge on his part of the properties of gasoline and of the dangers incident thereto.

As the result of the explosion the plaintiff was terribly scarred and disfigured on his face, neck and ears. The burns which he received are described as being of the third degree, resulting in red scar tissue which will continue during his life. This scar tissue, which is most disfiguring, extends from the right side of the face under the chin and up on the left side of the face and the top of the left ear. The outer lobes of one of the ears were entirely burned off. This disfigurement naturally influenced the jury in arriving at their verdict. But with the amount awarded we have nothing to do.

The court in charging on the subject of damages was asked to charge "that any disfigurement which causes the plaintiff shame and humiliation is a measure of damages." The court, having already charged that the jury might take into consideration all the pain of body and mind the plaintiff had suffered as a direct result of the injuries he received, seemed to be in doubt and asked counsel whether he pressed it, and counsel replied: "Yes, sir; I do." Thereupon the court said: "Then

I so charge." The instruction as asked was entirely unnecessary and the words in which it was framed were not well chosen, and we think the court might well have declined to give it on the ground that the subject had been sufficiently covered, inasmuch as he had already instructed that the jury could consider "all the pain of body and mind he has suffered as a direct result of the injuries he received * * * from the time of the accident to the present time. * * * All the pain and suffering, if any, he will endure in the future which directly grows out of his complained of injuries." Shame and humiliation are a part of his pain of mind. Shame and humiliation under the circumstances shown meant nothing more than mental anguish as resulting from and part of physical suffering. In *McDermott vs. Severe*, 202 U. S., 600, 611, the court sustained an instruction in the case of a boy who had lost a leg that the jury could consider mental suffering past and future found to be the necessary consequence of the loss of his leg. "It is objected," said the court, "that this instruction permits a recovery for future humiliation and embarrassment of mind and feelings because of the loss of the leg. But we find no objection to the charge as given in this respect." And see *Kennon vs. Gilmer*, 131 U. S., 22, 26.

Judgment affirmed.

Hough, C. J., dissents.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 9th day of February, one thousand nine hundred and nineteen.

Present—HON. HENRY WADE ROGERS,

HON. CHARLES M. HOUGH,

HON. MARTIN T. MANTON,

Circuit Judges.

ERIE RAILROAD COMPANY,

Plaintiff-in-Error,

AGAINST

WILLIAM M. COLLINS,

Defendant-in-Error.

Error to the District Court of the United States for the Western District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed with interest and costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H.W.R.

C.M.H.



UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 246 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Erie Railroad Company, against William M. Collins, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 24th day of March in the year of our Lord One Thousand Nine Hundred and Nineteen and of the Independence of the said United States the One Hundred and forty-third.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which Erie Railroad Company is plaintiff in error, and William M. Collins is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Western District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-third day of May, in the year of our Lord one thousand nine hundred and nineteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 27,057. Supreme Court of the United States, No. 971, October Term, 1918. Erie Railroad Company vs. William M. Collins. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed May 29, 1919. William Parkin, Clerk.

United States Circuit Court of Appeals for the Second Circuit.

ERIE RAILROAD COMPANY, Plaintiff-in-Error,
against

WILLIAM M. COLLINS, Defendant-in-Error.

Whereas, the United States Supreme Court has directed a writ of certiorari dated the 23rd day of May, 1919, to the Judges of the United States Circuit Court of Appeals for the Second Circuit, commanding them to send the record and proceedings in said cause to the said Supreme Court so that the said Supreme Court may act thereon; and

Whereas, on the application for said writ a certified transcript of the record on file in the office of the United States Circuit Court of Appeals for the Second Circuit was duly filed with the Clerk of the United States Supreme Court at Washington, D. C.

Now, therefore, it is

Stipulated by and between the counsel for the respective parties hereto that the certified transcript of the record now on file in the office of the Clerk of the United States Supreme Court may be used as a return to the writ so granted herein as aforesaid and the Clerk of the Circuit Court of Appeals for the Second Circuit is hereby authorized to return this stipulation in lieu of any further return to said writ.

Dated: Buffalo, N. Y., May 26, 1919.

MOOT, SPRAGUE, BROWNELL &
MARCY,

Counsel for Erie R. R. Co., Plaintiff-in-Error.

HAMILTON WARD,

Counsel for William M. Collins, Defendant-in-Error.

To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the Honorable the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to writ of certiorari herein.

Dated, New York May 29th, 1919.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,

Clerk of the United States Circuit

Court of Appeals for the Second Circuit.

[Endorsed:] 971. 27,057. United States Circuit Court of Appeals, Second Circuit. Erie R. R. Co. v. Wm. M. Collins. Return to Certiorari.

[Endorsed:] File No. 27,057. Supreme Court U. S., October Term, 1919. Term No. 348. Erie R. R. Co., Petitioner, vs. Wm. M. Collins. Writ of Certiorari and return. Filed June 2, 1919.

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Supreme Court of the United States

OCTOBER TERM, 1919.

No. 348.....

ERIE RAILROAD COMPANY,

PETITIONER, APPELLANT,

vs.

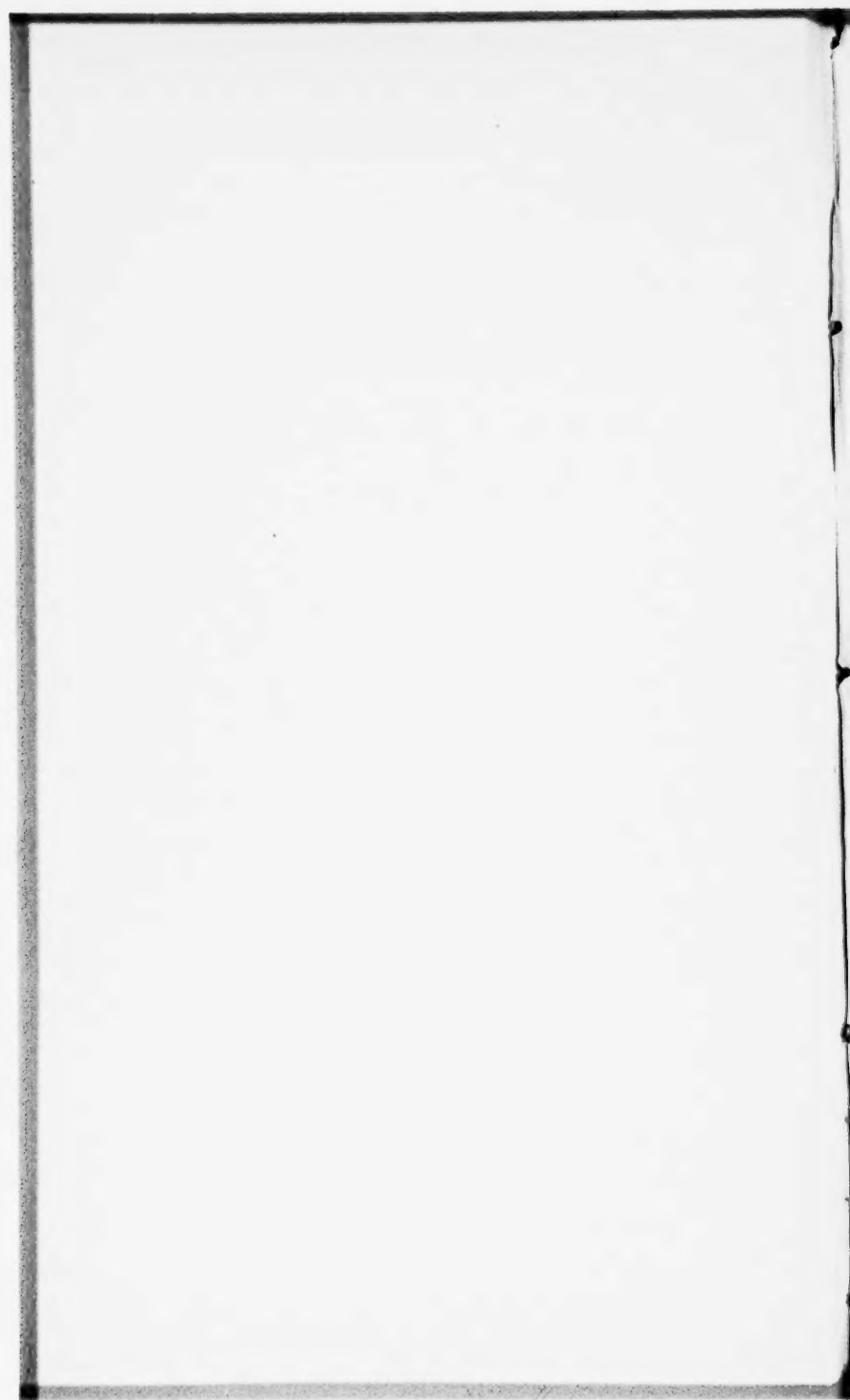
WILLIAM M. COLLINS,

RESPONDENT.

PETITION AND MOTION FOR LEAVE
TO ADVANCE.

MOOT, SPRAGUE, BROWNELL & MARCY,
Attorneys for Petitioner.

ADELBERT MOOT,
Of Counsel.



SUPREME COURT OF THE
UNITED STATES.

OCTOBER TERM, 1919.

ERIE RAILROAD COMPANY,
PETITIONER,
against
WILLIAM M. COLLINS,
RESPONDENT.

Motion to Advance Case.

SIR:

PLEASE TAKE NOTICE that upon the annexed petition and upon the Transcript of Record filed herein, the undersigned will move this Court, at the October Term, 1919, thereof, to be held in the Capitol at the City of Washington, District of Columbia, on the 17th day of November, 1919, at the opening of Court on that day or as soon thereafter as counsel can be heard, for an order directing that the argument of the appeal in this case be advanced and that the same be set down for a day certain to be fixed by the Court.

DATED: Buffalo, N. Y., November , 1919.

Yours, etc.,

ADELBERT MOOT,

Counsel for Petitioner,

Office and Postoffice Address, 302 Erie County
Bank Bldg., Buffalo, N. Y.

To:

HAMILTON WARD, Esq.,

Attorney for Respondent,

104 Erie County Bank Bldg., Buffalo, N. Y.

SUPREME COURT OF THE
UNITED STATES,
OCTOBER TERM, 1919.

ERIE RAILROAD COMPANY,
PETITIONER,
against
WILLIAM M. COLLINS,
RESPONDENT.

*To the Honorable Chief Justice and the Associate
Justices of the Supreme Court of the United
States:*

Petition on Motion to Advance Case.

The petition of Erie Railroad Company, a New York corporation, respectfully shows as follows:

Statement.

1. This case comes before this Honorable Court pursuant to a writ of *certiorari* granted herein to review a judgment of the United States Circuit Court of Appeals for the Second Circuit.

2. William M. Collins, in the course of his employment by the Erie Railroad Company, was burned by the ignition of gasoline with which he was priming a gasoline engine by which water was pumped from the earth into a tank from which it flowed into engines used in interstate commerce and into engines used in intrastate commerce. Against the contention of the employer that Collins, at the time of his injury, was

not employed in interstate commerce within the meaning of that term as used in the Federal Employers' Liability Act, a judgment was recovered by Collins in the District Court under the provisions of that Act, which judgment has been affirmed in the Circuit Court of Appeals, Second Circuit, by a divided vote of the members of the Court.

3. A writ of *certiorari* has been allowed by this Court to the Circuit Court of Appeals, Second Circuit, in the case of Szary against the Erie Railroad Company, involving a similar question of the construction and application of the Federal Employers' Liability Act in relation to the character of the employment of a person injured while removing ashes from a stove in which sand had been dried which was later placed in storage from which it was distributed in part to locomotives engaged in interstate commerce and in part to locomotives engaged in intrastate commerce.

4. The writ of *certiorari* was allowed in these cases because of the marked diversity of opinion existing in the various Circuit and District Courts of the United States, which is typified by the opinions of the four judges who heard and decided the Szary case and the present case. In view of the fact that similar cases are constantly arising, not only in the Federal Courts, but also in the State Courts, it is respectfully submitted that an early decision should be made in the case at bar and the law settled as soon as possible, in the interest of railroad employers and employees, and for the guidance of the lower courts.

5. The attorney for the respondent joins in this petition.

WHEREFORE your petitioner respectfully prays that this Honorable Court will grant its motion to advance this case on the calendar of this Honorable Court because of the general importance and public interest in the questions involved, and that, if possible, the case be advanced upon the calendar of this Court.

Respectfully submitted,

ADELBERT MOOT,

*Counsel for Petitioner, Erie Railroad
Company.*



FILED

APR 10 1919

JAMES D. MAHER,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1918

No. **1348**

ERIE RAILROAD COMPANY,

PETITIONER,

vs.

WILLIAM M. COLLINS,

RESPONDENT.

PETITION AND MOTION, WITH NOTICE, FOR
WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF AP-
PEALS FOR THE SECOND
CIRCUIT
and
BRIEF IN SUPPORT THEREOF.

MOOT, SPRAGUE, BROWNELL & MARCY,
Attorneys for Petitioner.

ADELBERT MOOT,
Of Counsel.



SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1918

ERIE RAILROAD COMPANY,

PETITIONER,

VS.

WILLIAM M. COLLINS,

RESPONDENT.

WILLIAM M. COLLINS, respondent, is hereby notified that the Erie Railroad Company, petitioner, will, on the 5th day of May, 1919, upon its petition and a copy of the entire record in the case, upon the opening of court on that day, or as soon thereafter as counsel can be heard, submit a motion, copy of which and of the petition for writ of certiorari and brief in support thereof, is herewith delivered to you, to the Supreme Court of the United States in its courtroom at the Capitol in the City of Washington, D. C.

ADELBERT MOOT,
Attorney for Petitioner.

SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1918

ERIE RAILROAD COMPANY,
PETITIONER,

VS.

WILLIAM M. COLLINS,
RESPONDENT.

Comes now Erie Railroad Company by Adelbert Moot, its counsel, and moves this Honorable Court that it shall, upon certiorari, or other proper process, directed to the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit, require said court to certify to this court for its review and determination a certain cause in said Circuit Court of Appeals lately pending wherein the respondent, William M. Collins, was defendant-in-error, and your petitioner, Erie Railroad Company, was plaintiff-in-error, and to that end it now tenders herewith its petition and brief and a certified copy of the entire record in such cause in said Circuit Court of Appeals.

ADELBERT MOOT,
Counsel for Petitioner.

SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1918

ERIE RAILROAD COMPANY,

PETITIONER,

VS.

WILLIAM M. COLLINS,

RESPONDENT.

*To the Honorable Supreme Court of the
United States:*

The petition of the Erie Railroad Company respectfully shows to this Honorable Court as follows:

This action was brought by William M. Collins to recover damages against the Erie Railroad Company for personal injuries received by him in the course of his employment by it and while he was operating a gasoline engine and pump by which water was pumped from the earth and to a tank from which it flowed into the locomotives of the petitioner. We shall hereafter refer to Collins as the plaintiff and to the Erie Railroad Company as the defendant.

The action was brought in the United States District Court for the Western District of New York under the Federal Employers' Liability Act and was tried in November, 1917, before Hon.

Edward S. Thomas, United States District Judge, and a jury upon whose verdict judgment was entered in favor of the plaintiff and against the defendant for the sum of \$15,045.66. Upon a writ of error to the Circuit Court of Appeals for the Second Circuit the judgment entered upon the verdict was affirmed on the 30th day of January, 1919, by a divided court, Circuit Judges Rogers and Manton voting for affirmance and Circuit Judge Hough dissenting.

The facts relating to the character of the plaintiff's employment at the time of his injury and to the manner in which the injuries were received are as follows:

The plaintiff was injured through the ignition or explosion of gasoline which he was using in the operation of a gasoline engine by which water was pumped from the ground into a tank from which it flowed into locomotives, some of which were engaged in hauling intrastate commerce and some of which were engaged in hauling interstate commerce (fols. 619, 620).

At the time of plaintiff's injury the Erie Railroad Company was a common carrier by railroad engaged in commerce between the States of New Jersey, New York, and other states and one division of its railroad extended from Hornell in the State of New York to Buffalo in the State of New York on which division is located the Village of Canaseraga, New York. Near said village the defendant had a group of three structures known respectively as the tower, the pump house about 40 feet from the tower, in which was located the gasoline engine, and pump, and the water tank

distant about 1000 feet from the other structures mentioned, into which the water was pumped and from which the water flowed into the locomotives.

At the time of his accident plaintiff was about 22 years of age, had had a three year course at the high school of his native town (fol. 93) and had been an employee of railroad companies for five years (fol. 101). Six or seven years before his injury the plaintiff learned how to operate this gasoline engine through observation of his brother whose duty it was at the time to operate it (fols. 108, 314, 315, 316, 323, 324, 327).

About two years before he was injured plaintiff was employed by the defendant at the same place and in the same kind of work as at the time of the accident, as a part of which he was required to operate the gasoline engine with which he had become so familiar through observing his brother that he was able to operate it without further instructions (fols. 328, 329).

During the period of employment at the time of his accident the only work which the plaintiff performed for the defendant in the pump house was the operation of the gasoline engine and pump. His other work during that period, performed at other times and places, consisted of throwing switches along the right-of-way and in reporting by Telephone from the structure known as the tower, trains passing it and in receiving at the tower by telephone information for transmission to the operators of passing trains.

His injuries were burns on the hands and head.

In the Trial Court and in the Circuit Court of Appeals the petitioner contended and in this

Court contends that at the time of his injury the plaintiff was not employed in interstate commerce within the meaning of that term as used in the Federal Employers' Liability Act, as that act had been construed by this Court in *D., L. & W. R. R. Co. vs. Yourkonis*, 238 U. S., 439; in *C. B. & Q. vs. Harrington*, 241 U. S., 177; and in *Lehigh Valley R. R. Co. vs. Barlow*, 244 U. S., 183.

The *Collins* case was decided by the Circuit Court of Appeals, at the time composed of Circuit Judges Rogers, Hough and Manton, of whom, as stated, Judge Hough dissented. Shortly after the decision in the *Collins* case there came before the same Court, at the time composed of Circuit Judges Rogers and Hough and District Judge Learned Hand, the case of *Antoni Szary against the Erie Railroad Company*, whose work, when injured, was quite like that of Collins, which had been tried before Judge Manton.

In the *Szary* case Judge Hand said:

“The case of *Collins against the Erie Railroad Company* is, in my judgment, quite indistinguishable from the case at bar. It was argued earlier than this case before a Court differently organized and was in fact decided earlier, although the decision had not been handed down. It seems to me that it should control here and I agree to affirm upon its authority. As a matter of first impression I confess I should have thought both cases within the doctrine of *C. B. & Q. R. R. Co. vs. Harrington*, 241 U. S., 177.”

In the *Szary* case Judge Hough said:

"I agree to affirmance for the reasons above stated. Judge Hough's memorandum also sufficiently indicates the ground of my dissent in the *Collins* case."

It appears from the opinions in the *Collins* and *Szary* cases that the members of the Circuit Court of Appeals, Second Circuit, are evenly divided upon the question of whether work of the character performed by Collins and Szary constitutes employment in interstate commerce, Judges Rogers and Manton expressing the opinion that it does, Judges Hough and Learned Hand expressing the opinion that it does not.

Your petitioner further shows that there is lack of uniformity in the decisions of the various Courts, State and Federal, upon the question of whether the work of obtaining from the earth or otherwise and the placing in a convenient location for use of the articles which are consumed a commerce is employment in interstate commerce within the meaning of the Federal Employers' Liability Act, which lack of uniformity is more fully set forth in the petition to this Court for a writ of certiorari entitled *Erie Railroad Company, petitioner against Antoni Szary, respondent*, to be submitted to this Court on the date of the submission of this petition.

Your petitioner presents to this court as an exhibit to this petition a certified copy of the entire transcript of the record of this case including the proceedings in the Circuit Court of Ap-

peals, Second Circuit, to which the writ of certiorari is asked to be directed; also a brief of its argument upon the questions of law involved.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari, may issue out of and under the seal of this Court, directed to the Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court upon a day certain, to be therein designated, a full transcript of the record of all the proceedings of the said Circuit Court of Appeals in this case, which was entitled in that court "*Erie Railroad Company, Plaintiff-in-Error, against William M. Collins, Defendant-in-Error,*" to the end that said cause may be reviewed and determined by this Court, as required by law, and that your petitioner may have such other and further remedy in the premises as to this Court may seem appropriate, and that the judgment of said Circuit Court of Appeals may be reversed by this Honorable Court.

ERIE RAILROAD COMPANY,

By ADELBERT MOOT,

Its Attorney.

SUPREME COURT OF THE
UNITED STATES,
OCTOBER TERM, 1918.

ERIE RAILROAD COMPANY,
PETITIONER,
vs.
WILLIAM M. COLLINS,
RESPONDENT.

**BRIEF ON BEHALF OF ERIE RAILROAD COM-
PANY IN SUPPORT OF ITS PETITION FOR A
WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT.**

In the District Court of the United States for the Western District of New York, it was held that at the time of his injury Collins was employed in and his employer, the Erie Railroad Company, engaged in interstate commerce and Collins recovered judgment against the Erie Railroad Company in the sum of \$15,045.66 on account of injuries alleged by him to have been received in the course of his employment through the negligence of his employer. The cause, on writ of error, came before the Circuit Court of Appeals

which, Judge Hough dissenting, affirmed the judgment.

The evidence received on the trial of this action shows :

That the employer, Erie Railroad Company, at the time of the employee's, Collins, injuries was a common carrier by railroad engaged in commerce between the States of New Jersey, New York, and other states and that one division of its railroad extended from Hornell in the State of New York to Buffalo in the State of New York, on which division is located the Village of Canaseraga, New York.

That upon its right of way and near the Village of Canaseraga, New York, the employer at the time of the employee's injury had a group of three structures, known respectively as the tower, the pump house distant about 40 feet from the tower, and the water tank distant about 1000 feet from the other two structures mentioned.

That the employee was injured by the ignition of gasoline which he was using in the operation of the gasoline engine and pump located in the pump house.

That by the gasoline engine and pump water was pumped from the earth into the tank from which it flowed into locomotives of the employer, some of which were engaged in hauling intrastate commerce and some of which were engaged in hauling interstate commerce.

That the employee's other duties consisted of reporting from the tower by telephone trains which passed it and receiving telephone communications for delivery to trains stopping at or

passing the tower, and the throwing of switches upon the employer's right of way.

That the employe's injuries consisted of burns on the hands and head.

POINT I.

Because of the diversity of views in the Circuit Court of Appeals, Second Circuit, upon the questions of law involved and the lack of uniformity in the decisions upon like questions of law in various courts, federal and state, throughout the country the writ of certiorari prayed for should be granted.

In this case upon the question of whether the plaintiff at the time of his injury was employed in interstate commerce, the Circuit Court of Appeals divided two to one in favor of the plaintiff.

In *Szary vs. Erie Railroad Company*, in which the plaintiff's work when injured was similar to that of Collins, decided a few days later by the same court differently composed, two of the three members of the court, although bound by the decision in the Collins case, expressed the view that the plaintiff's employment was not in interstate commerce.

The construction of the Federal Employers' Liability Act by this Court in the *Yourkonis*, *Harrington* and *Barlow* cases, excludes from its benefits persons injured while employed in the work of obtaining, assembling and placing conveniently for use the articles which are consumed in commerce, even when that commerce is interstate.

In the *Yourkonis* case counsel for the employer admitted that the mined coal was for use in interstate commerce. In the *Harrington* case the opinion of this court was written upon the assumption that the coal was being conveniently placed for use in interstate commerce. The decisions of the state courts in the *Barlow* case were based upon the movement of the coal in interstate commerce and upon its intended use by the employer in interstate commerce.

The Circuit Court of Appeals, Fourth Circuit, held that the injured person was not employed in interstate commerce upon the following statement of facts:

“But for the accident the plaintiff with other employes would have placed the push car on the track, received the ice from the wagons through the chute, pushed the car to the ice box, and removed the ice from the car to the box. After this the plaintiff in the usual course of his employment would have iced from the box cars to be attached to both interstate and intrastate trains. The cars that he would, in due course, have first iced would have been cars to be used in interstate commerce. Application to these facts of the decisions of the Supreme Court leaves no escape from the conclusion that the plaintiff was not engaged in interstate commerce at the time of the injury, and therefore could not recover under the Federal statute.”

Southern Ry. Co. vs. Pitchford, 253 Fed. Rep., 736.

There is no difference in principle between the work of mining coal or receiving ice or pumping water or drying sand or the placing of any one of those articles for convenient use in commerce. It seems necessary, however, that this Court shall expressly declare that the construction which it placed upon the Federal Employers' Liability Act in the Yourkonis, Harrington and Barlow cases, is applicable in the decision of cases of persons injured while obtaining, or preparing, or placing conveniently for use, sand, or ice, or water, or oil, or any of the other articles which are consumed in commerce.

POINT II.

The Trial Court erred in ruling that at the time of his injury the employe was employed in interstate commerce and that the rights and liabilities of the parties were governed by the Federal Employers' Liability Act.

This question was raised by a motion for a nonsuit at the close of plaintiff's case (fol. 621), by the renewed motion for a nonsuit at the close of all the evidence (fol. 703), and by the defendant's request to charge (fol. 797) and is referred to in assignments of error 5, 6 and 7 (fols. 860, 867).

The employe's work in the operation of the gasoline engine and pump was easily separable from his other duties, none of which was performed in the pump house in which the gasoline engine was located.

The character of his employment at the time of his injury, whether interstate or intrastate, depends upon the work in which he, at the time, was engaged.

This test of the character of the plaintiff's employment is recognized by Circuit Judge Rogers who, in his opinion in this case, says:

"The character of the plaintiff's employment at the time of his injury, whether interstate or intrastate, depends upon the character of the work in which he was at that time engaged."

Eric Railroad Company vs. Collins, Circuit Court of Appeals, Second Circuit.

In an action growing out of an injury to an employe while he was assisting in clearing up a wreck, the Supreme Court in deciding the question of the character of his employment, said:

"Of course, we attribute no significance to the fact that plaintiff had been engaged in inspecting interstate commerce before he was called aside by the occurrence of the collision."

Southern Railroad Company vs. Puckett,
224 U. S., 571, at page 574.

In an action brought to recover on account of an injury received by an employe while switching cars moving in intrastate commerce, whose work included switching cars moving in interstate commerce, the Supreme Court said:

“Giving to the words ‘suffering injury while he is employed by such carrier in such commerce’ their material meaning, as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employe is engaged is a part of interstate commerce. * * *

“Here, at the time of the fatal injury the intestate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another. That was not a service in interstate commerce and so the injury and resulting death were not within the statute. That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury.”

Illinois Central R. R. Co. vs. Behrens,
233 U. S., 473, at page 478.

In an action brought to recover for injuries received by the employe while in quest of orders which when received would have required him immediately to make up an interstate train, the Supreme Court said:

“By the terms of the Employers’ Liability Act the true test is the nature of the work being done at the time of the injury and the mere expectation that plaintiff would pres-

ently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the act."

Eric Railroad Co. vs. Welsh, 242 U. S., 303, at page 306.

His Honor, Justice Brandeis, in the introductory part of his dissenting opinion in the Winfield case, and there is nothing in the opinion of the court in conflict with it, says:

"Later decisions disclose how large a part of the injuries resulting from the railroads' negligence are thus excluded from the operation of the federal law. For the act was held to apply only to those *directly* engaged in interstate commerce. This excludes not only those engaged in interstate commerce, but also the many who—while engaged on work *for* interstate commerce as in repairing engines or cars—are not directly engaged *in* it. Likewise it excludes employees who, though habitually engaged directly in interstate commerce, *happen* to be injured or killed through the railroads' negligence, while performing some work in intrastate commerce."

New York Central R. R. Co. vs. Winfield, 244 U. S., 147 at page 163. The italics appear in the officially reported opinion.

At the time of his injury Collins was employed in pumping water from the earth into a tank one thousand feet distant, from which it would flow

into locomotives, some engaged in interstate commerce and some engaged in intrastate commerce (fols. 619, 620). Collins had no duty with reference to taking water from the tank to the engines—that work was done by the engine crew (fol. 155, 156). The pump which Collins was operating when injured accomplished two things—it drew the water from the earth and it placed it in a tank, conveniently located, from which it might flow into locomotives.

The U. S. Supreme Court has held that a person employed in mining coal for use by his employer on locomotives engaged in interstate commerce was not employed in such commerce. The court said:

“In the course of the trial, during examination of the witness, while evidence was being offered to show the disposition of the coal mined, counsel for defendant stated that it used the coal mined in its locomotives in interstate commerce.

* * * * *

“The mere fact that the coal might be or was intended to be used in the conduct of interstate commerce, after the same was mined and transported, did not make the injury one received by the plaintiff while he was engaged in interstate commerce.”

D., L. & W. vs. Yourkonis, 238 U. S., 439.

Collins, like Yourkonis, at the time of injury was employed in extracting from the earth an article for consumption by the instrumentalities

of commerce. If the miner of coal for use in interstate commerce was not employed in that commerce, then the drawer of water for a like purpose, was not employed in interstate commerce.

In its opinion the Supreme Court refers to the circumstance of the transportation of the coal after it was mined. This reference, however, is without significance. The work of the miner does not become a part of interstate commerce merely because his employer does not transport the coal which is mined before it is consumed in interstate commerce. If the element of the transportation of the coal were the decisive factor, we would have the curious situation of a miner employed in interstate commerce when his employer, at the mouth of the pit, turned the coal into motive power for hauling interstate commerce, and not employed in interstate commerce if his employer found it necessary to transport the coal before it was consumed in such commerce.

If a railroad company employed an engineer to pump water from the earth at a distance from its right of way and transported the water by cars or a pipe line to a water tank upon its right of way, for use there upon engines engaged in interstate commerce, we would have a situation exactly like the one presented to the court in the *Yourkonis* case. On principle the court must reach the conclusion that the engineer pumping the water has no closer relationship to interstate commerce than the coal miner has in mining coal for use in interstate commerce. In pumping water for use in interstate commerce, the character of the employment, whether interstate or not, does not depend

upon the remoteness of the source of supply from the point of use or of its proximity thereto. The pumping engineer not employed in interstate commerce when drawing water from the earth at a point remote from the railroad, for use upon it in interstate commerce, does not become employed in that commerce when the location of his place of employment approaches the railroad company's right of way.

In addition to drawing the water from the earth, the engine operated by Collins placed the water in a tank from which it could be taken with convenience, as required for use. This phase of the work was analogous to that done by the injured employee in *C. B. & Q. vs. Harrington* (241 U. S., 177), who, when injured, was placing cars of coal on a trestle from which it could be unloaded through chutes to the tenders of locomotives.

In the *Harrington* case the U. S. Supreme Court, after assuming that all the locomotives which were supplied with coal from the chutes on which *Harrington*, when injured, was placing the cars of coal for unloading, were engaged in interstate commerce, said:

"That duty was solely in connection with the removal of the coal from the storage tracks to the coal shed or chutes, and the only ground for invoking the Federal Act is that the coal thus placed was to be used by locomotives in interstate hauls.

"As we have pointed out, the Federal Act speaks of interstate commerce in a practical

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sense suited to the occasion and 'the true test of employment in such commerce in the sense intended is, was the employe at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it.' *Shanks vs. D. L. & W. R. R.*, 239 U. S., 556, 558, and cases there cited. Manifestly, there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes. This was nothing more than the putting of the coal supply in a convenient place from which it could be taken as required for use. It has been held that an employee of the carrier while he is mining coal in the carrier's colliery intended to be used by its interstate locomotives is not engaged in interstate commerce within the meaning of the Federal Act (*D., L. & W. R. R. vs. Yourkonis*, 238 U. S., 439), and there is no distinction in principle between the two cases. In *Great Northern Ry. vs. Knapp*, 240 U. S., 474, the question whether the employee was engaged in interstate commerce was not presented, as the application of the Federal statute was conceded in the State Court."

If the mining of coal for use on locomotives hauling interstate commerce and the placing of it in a convenient place for loading on locomotives hauling such commerce, had been done by one man instead of by many, his work would not have possessed the character of interstate commerce, when the same work performed by many lacked that

character. So with Collins. The performance by him of the work of extracting the water from the earth, similar to the work performed by Yourkonis, coupled with the performance by him of the work of placing the water in a convenient place for use, similar to the work performed by Harrington, did not bring him into such a close or direct relation with interstate transportation as to make his work practically a part of it.

The claimant, in *Barlow vs. the Lehigh Valley* (244 U. S., 183), when injured was performing work similar to that performed by Harrington, but the U. S. Supreme Court held that the work had not that intimate relation to interstate commerce required for the application of the Federal Employers' Liability Act.

It is argued by Collins' counsel that without the service which Collins was rendering when injured, commerce would be seriously interrupted, if it did not cease. Commerce would not continue without machine shops for the repair of cars and locomotives, but the courts have held that employment in the shops in which cars and locomotives which hauled interstate commerce were repaired, was not a part of interstate commerce.

D., L. & W. R. R. Co. vs. Shanks, 239
U. S., 556.

Commerce would not continue if the railroads were without round houses for the storing, clean-

ing and preparation of locomotives, but the man who rebuilds the round house in order that its use may be continued for caring for locomotives which haul interstate commerce, is not employed in that commerce.

Kelly vs. Pennsylvania R. R. Co., 238 Fed., 95.

It is essential to the continuance of interstate commerce that the engines which haul it and the cars which carry it be repaired, which can be done most conveniently when they are temporarily withdrawn from service, but one injured while making such repairs upon these instrumentalities of commerce while temporarily withdrawn from service, is not employed in interstate commerce, even though the instrumentality, both before and after the repair, is used in such commerce.

M. & S. R. Co. vs. Winters, 242 U. S., 353.

The erection and maintenance of the structures in which the instrumentalities of commerce are built, repaired and housed, the construction and repair of the instrumentalities of commerce, the procurement and placing for convenient use of the articles consumed in commerce, when they have relationship to interstate commerce are properly classified as work *for* interstate commerce and not as work *in* interstate commerce.

POINT III.

It is respectfully submitted that because of the diversity of decisions in the various federal and state courts, and because of the absence of definite ruling of this court which will control the lower courts in like cases, the petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit should be granted.

ADELBERT MOOT,
Counsel for Petitioner.



Supreme Court of the United States

OCTOBER TERM, 1918.

Office Supreme Court, U. S.

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ERIE RAILROAD COMPANY,
PETITIONER,

vs.

WILLIAM M. COLLINS,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI.

HAMILTON WARD,
Attorney for Respondent.

IRVING W. COLE,
Of Counsel.



SUPREME COURT OF THE UNITED
STATES.

OCTOBER TERM, 1918.

ERIE RAILROAD COMPANY,
PETITIONER,
vs.
WILLIAM M. COLLINS,
RESPONDENT.

**BRIEF IN OPPOSITION TO THE APPLI-
CATION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEC-
OND CIRCUIT.**

Plaintiff in the Trial Court, William M. Collins, is referred to herein as defendant in error, and defendant in the Trial Court, Erie Railroad Company, is referred to herein as plaintiff in error.

Action by William M. Collins, plaintiff in the Trial Court, against Erie Railroad Company for damages for personal injuries caused by the negligence of said railroad company under the Federal Employers' Liability Act.

The sole question sought to be reviewed by

the Supreme Court is "was defendant in error employed in interstate commerce at the time of his injuries"?

FACTS.

It is conceded that plaintiff in error was engaged in interstate commerce within the meaning of said act at the time of the accident. It was stipulated at the trial that at such time and prior thereto, trains in interstate traffic, with which the work of defendant in error had to do, ran daily over its lines at the tower in question, and that water from the tank mentioned in the complaint was supplied daily in part to engines which were at the time engaged in hauling interstate freight, and in part to those at the time hauling intrastate freight. (Fols. 619, 620).

On the question as to whether defendant in error at the time of the injury was employed in interstate commerce, we first have the admission of the railroad company that it was so engaged at the time and place (Fols. 619, 620); by which it is conceded that interstate commerce was present.

The map, Defendant's Exhibit 10, and the photo, Plaintiff's Exhibit 1, show the exterior physical situation. The tower is located, according to the descriptive terms of the railroad company, on the south side of several of its main tracks used for traffic from New York City through the State of New York and to the west into other States. The tower is used for the pur-

poses of watching and signaling with reference to trains, both interstate and intrastate, passing both ways. About thirty trains passed regularly each day. Defendant in error's regular place of employment was in the upper story of the tower enclosed mostly by glass in which were telegraph and telephone instruments which it was part of his duties to use. About forty feet to the east of the tower on the same side of the tracks the pump house was located. This is a structure twenty-five feet long and about fifteen feet wide in which was a gasoline engine. The map shows the plan of this pump house and the rear and side elevations and floor plan, and defendant in error's Exhibit 2, and plaintiff in error's Exhibits 2, 3 and 4, are pictures showing this engine and the interior of the pump house. The engine was used to operate the pump which pumped water from a well situate about eight or ten feet west of the west end of the pump house into the water tank situate some distance away for the purpose of supplying these engines with water.

It was shown that defendant in error was, at the time of his injury, December 25, 1915 (Fol. 449), a young man twenty-one years of age (Fol. 93), unmarried (Fol. 223). Previous to that he was sound and well, physically perfect, with no scars on hands or face (Fols. 94, 95). He had been educated in the grammar school and three years in the high school of Canaseraga where he resides with his parents (Fol. 93) who were farmers (Fol. 95).

While living at home and going to school he had worked some as helper in the station at Canas-eraga for the Pittsburgh, Calumet & Northwestern Railroad Company, starting the fire in the morning, and selling tickets, going to school at nine o'clock. That was his first job. He learned telegraphing (Fol. 101). He first worked for defendant when seventeen years old as night operator and ticket seller (Fols. 99, 100) from January 15, 1912, to September 1, 1913, and about the latter date went back for a time to his first employer as telegraph operator (Fols. 99, 103). Worked there until the following April (Fols. 103, 104) and went back to defendant as an extra or relief telegraph operator (Fol. 105) and on December 21, 1915, was sent to take charge of the tower in question as night man (Fols. 139-142) and worked there four days until the time of the accident (Fol. 106).

He was charged with a multiplicity of duties when put in charge of this interstate plant on December 21, 1915. He was by occupation a telegraph operator. He was required, however, not only to operate the telegraph instruments in the signal tower, but also the telephones therein, also the switches and this gasoline engine outside, and keep the water tank supplied with water, and was, as he termed it, signal man, level man, and incidently ran the gasoline engine and pump (Fol. 105). A great many of these passing trains took the sidings which were there and it was necessary for defendant in error to go up and down the

track when a train wanted to take one of these sidings and line the switches for that purpose, besides running the tower and gasoline engine (Fol. 140). He described his duties there as follows:

“Reported trains as they went back and forth by the tower to the dispatcher in Buffalo. In case a train wanted to go on the siding the dispatcher would notify you to put the train on the siding and it was necessary to walk down the track four or five rods and throw the switch and walk up the track about the same distance to put these trains in there, the same way going east and west.” (Fols. 139-142).

He had sole charge of this tower at night (Fol. 142). Had telegraph instruments there but reported trains by telephone usually. (Fols. 143, 144). He was also required to operate the pump and gasoline engine when necessary to fill the water tank to keep the railroad engines supplied with water (Fols. 107, 181-186). It was his duty to keep an adequate supply of water in the tank (Fol. 253).

At Hunts about ten or eleven miles west of this tower the lines branch off to Jamestown and west into the State of Ohio (Fols. 145, 146). Trains and cars to and from New York, Cleveland and Chicago all in different states thus pass the tower (Fols. 146, 147). About twenty-five or

thirty freight trains a day pass the tower each way (Fols. 147, 148). In addition to that there were a number of passenger trains operating over the same tracks (Fol. 149). Twenty-five engines a day took water there (Fol. 150). The water tank held about two hundred fifty barrels (Fols. 151, 152). An engine would usually take about two and one-half feet of water out of the tank (Fols. 152, 153). The tank was sixteen feet high (Fol. 153), so seven or eight engines would exhaust the water in the tank (Fol. 153). Defendant in error had no advance information when engines intended to stop for water (Fol. 154). He kept a record of the engines that took water on his train sheet (Fol. 154). No permission was required to take water (Fol. 155). These twenty-five engines so taking water were drawing freight trains by the place (Fol. 156). There was a gauge on the tank showing the amount of water in it (Fols. 156, 157). This tower house and the gasoline engine and tank had been there in operation for sixteen or seventeen years. (Fols. 158, 159, 160, 161).

Defendant in error was required to report every train that went by whether he was asked by the train dispatcher to do so or not, even though they did not stop (Fol. 250) and also keep a record of them in the book (Fols. 251, 178, 179).

Another employee of plaintiff in error, William F. Jeffries, testified that he was the day man in charge of this tower at the time of the accident.

Had been there fifteen years. The tower had been there during that time, and the gasoline engine about twelve years. That he was supposed to be the manager and keep track and see that things went properly (Fols. 532, 536). He used the pump every day when it was necessary and had used it at night (Fols. 538, 539).

Defendant in error handled the apparatus there which stopped the trains and indicated the position of the switches, in electric block signals, so that he was appraised of the condition of the traffic on either side of them (Fols. 180, 181). These duties occupied his time and attention from the day he went there as night man to take charge on December 21st, to the time of the accident on December 25, 1915 (Fol. 181). Whenever it was necessary he was required to leave the tower and go to the pump house, set the gasoline engine in operation and operate the engine and pump for the purpose of refilling the water tank (Fols. 107, 181-186-253).

On the night of said December 25, there was a wreck on the road at Hunts ten or eleven miles to the west and as a consequence there were interstate trains on the siding at the tower, it being impossible to get by the derailment, and interstate engines were standing around there to water. (Fol. 181). They were drawing freight trains going to the west, that is, out of the state (Fol. 183). Defendant in error could not see the gauge at night on the tank and there was no way he could judge whether the water tank needed to

he refilled by the pumping process except by the number of engines which stopped there to take water (Fols. 184, 185). That night there was such an extraordinary number of engines there taking water, Collins went over to pump some water into the tank about 3:15 a. m., taking a regular railroad lantern with him (Fols. 185, 186).

While, therefore, he was in the very act of doing this, interstate engines were taking the water from the tank. The railroad company furnished this lantern and there were no others (Fols. 165-168). It was an ordinary railroad, kerosene lantern, flame covered by a globe attached to perforated metal at top and bottom. (Fols. 165-168).

It was shown that he had had no acquaintance with or experience in operating gasoline engines before he went to work on December 21, 1915 (Fols. 96, 97). He had worked at this tower three years before as night telegraph operator and ticket seller (Fols. 99, 100) for ten days. Had simply seen his brother operate the engine and simply got familiar with the ordinary movements necessary to go through to do that (Fol. 108). There were three men at the tower then having shifts of eight hours each (Fols. 109-112). Defendant in error did not operate the gasoline engine at that time (Fols. 112, 113) and received no instructions as to how to operate it before he went to work on said December 21, 1915 (Fols. 115, 116, 139), as the night man in charge of the tower, engine, pump house, tank and switches.

The statement of petitioner on page 5 of the printed petition and brief that Collins had learned how to operate and had operated this engine before is incorrect. He received no instructions at all before the accident as to how to operate the engine except by seeing Robert Pinkney do it (Fols. 162, 163). Nobody ever gave him any instructions or information regarding the use of this engine or the properties of gasoline. When he had been there three years before he had started the engine a few times and by seeing others operate it had learned the movements to go through in starting it and was able to describe them (Fols. 127-137). He had done and seen these things only in the daytime, however, and had never had occasion to use a lantern while doing it (Fols. 137, 138) because he had not done it before in the nighttime, and in the interval between the time he first worked there in 1913, and the time he went to work in December, 1915, he had had no experience with that or any other gasoline engine (Fols. 138, 139). When he first went to work there in 1915, he informed the man he relieved, Robert Pinkney, that he did not know how to run the engine and asked him to show him how (Fol. 165). Nobody had ever given him instructions or information on the subject before (Fol. 163). and he told Pinkney he had forgotten what he had learned during the ten days he was there two or three years before (Fol. 165). Together they went to the pump house and Pinkney set the engine going while de-

fendant in error held an ordinary railroad lantern for a light. That was 11:15 at night and Pinkney went through the *same performance as defendant in error went through when the accident happened* (Fols. 169, 176). The railroad company furnished the lantern and there were no others (Fol. 168). Pinkney did not say anything or give him any instructions about the danger of holding a lantern down to the floor. Collins did not know at that time and was never told that gasoline fumes seek lower levels. Pinkney used the tin can (Fols. 172, 173) like the one that had been used there before (Fols. 173, 174). There was no funnel, simply a wire for a handle so it could be hung over the end of the spigot. Had no spout only a very small dent in the side of the can pinched together in some way (Fols. 174, 175).

Defendant in error did not have occasion to operate the engine again before the accident on the night of the following December 25, 1915 (Fol. 177). He was night man and the traffic was lighter at night (Fol. 177), and the tank had not emptied itself at night prior to December 25th, and he was occupied by his other duties during the interval (Fols. 178-181).

It was while so attempting to perform the duty of setting this engine going and operating it on the night of December 25, 1915, a duty laid upon him, that the explosion and injuries occurred.

It is undisputed that defendant in error was terribly scarred and disfigured on his face, neck

and ears. These burns were of the third degree, resulting in scar tissue which is red and hideous in its appearance and will continue so during his life. They extended from the top of the right ear along the right side of the face under the chin and up on the left side of the face, and the top of the left ear, and the outer lobes of one of the ears were entirely burned off. The outer skin of the face, neck, chin and ears was badly burned in this way, and the scar tissue was crusted and hard, the hair follicles being destroyed.

All the above evidence as to interstate commerce was entirely undisputed, plaintiff in error offering no testimony at all on that subject.

POINT I.

As a matter of form at least we may refer to the numerous decisions of this court holding that the writ of certiorari is one of the extraordinary remedies allowed only in exceptional cases, (*Degge vs. Hitchcock*, 229 U. S. 162), is not issued as a matter of right, but only in the discretion of the court, and granted sparingly, and only in cases of gravity and importance.

Hamilton Brown Shoe Co. vs. Wolfe,
240 U. S., 251.

United States vs. Three Friends, 166 U.
S., 1.

Forsythe vs. Hammond, 166 U. S., 506.

American Construction Co. vs. Jackson-
ville R. R. Co., 148 U. S., 371.

Re Lau Ow Bew, 144 U. S., 47.

It is contended here by counsel for petitioner that there is a diversity of decisions in the lower courts on the question here involved, viz., was defendant in error employed in interstate commerce at the time of the accident. There is no such diversity or conflict. Some of the judges in the Second Circuit dissented from the rule established in that court, but nevertheless the rule is established by the decisions of that court without conflict that defendant in error was employed in interstate commerce. We know of no decision in any other of the Federal Courts, either the District Courts or Courts of Appeals, on the subject in conflict with that rule. Therefore there is no diversity of decisions in the lower courts to be ironed out.

POINT II.

This application presents neither an exceptional case or one of gravity or importance, and the single point sought to be reviewed, viz., whether William M. Collins, defendant in error, the plaintiff at the trial, was engaged in interstate employment or in work so closely related to or connected with interstate commerce as to come under the Federal Employers' Liability Act—is so plain and simple and so thoroughly settled by the decisions of this court in favor of respondent's position that a writ of certiorari is not required or warranted.

It being conceded by plaintiff in error that at the time of the accident it was an interstate commerce common carrier and at the precise moment engaged in interstate commerce (Fols. 619-620), and that defendant in error as its employee was in charge of a signal tower and the switches, and also the pumping station, gasoline engine, and water tank used in connection with and as a part of said interstate commerce, and that when defendant in error was injured he was in the discharge of a duty of such employment, it would seem plain enough that nothing remains on the point sought to be reviewed.

It must follow very plainly from these conceded, or at least undisputed, facts, that defendant in error was without any question engaged in interstate commerce at the time he was injured.

The character of the employment of defendant in error presents two phases in each of which it must be said that he was at the time employed in interstate commerce, and the evidence being undisputed the Trial Court correctly held, as a matter of law, that he was so employed. Plaintiff in error offered no evidence on the subject.

These two phases may be defined as follows:

First: His general employment as in charge of and in the operation of permanent and stationary instrumentalities being used generally and indiscriminately in both inter and intrastate commerce, consisting of the tower and the instrumentalities in connection therewith, the

pump house, gasoline engine, and the water tank. This clearly shows him to have been employed in interstate commerce at the time of the accident for he was in the discharge of one of his duties in such employment. What he was doing at the precise time is really immaterial as long as it was one of his duties, for he was in charge and operation of an interstate plant. However, he was at the very time of the accident employed on the gasoline engine and pump and water tank which were permanent and stationary instrumentalities of interstate commerce, although, also, of intrastate commerce.

Second: He was pumping water into the tank for the immediate use of interstate engines, and which was at the time being taken by such; and this water, being detached and transitory, the question insofar as it is concerned, turns on whether it had the interstate quality at the precise time—whether it was then being moved in connection with and as a part of interstate commerce, or so closely connected with as to be a part of it.

These two phases of his employment lead to consideration of the distinction running through all the cases, between employment upon permanent and stationary, and that upon movable, transitory and detached, instrumentalities of commerce.

With reference to the latter the interstate quality must exist in the thing the employee is moving or working on at the precise time. That

is it must be actually being used or moved, or definitely in movement or preparation for use in interstate commerce. It is then interstate only while the interstate function lasts. This rule applies to engines, cars and rolling stock of all kinds, and all objects movable in their ordinary use, and all articles of transportation.

But as to permanent and stationary instrumentalities such as tracks, roadbeds, round-houses, yards, stations, buildings, or signal towers, pump houses, gasoline engines, and water tanks, as in the case at bar, used indiscriminately in both kinds of commerce, the rule is different. An employee engaged in work on a bridge or track used in both interstate and intrastate commerce is within the act (Pedersen case, 229 U. S., 146). Even one employed on a train having both interstate and intrastate cars in it, although at the precise time employed on an intrastate car, or if only engaged in a side tracking movement of intrastate cars incident to the drawing of such a train from one point to another in the same state, is within the act (Carr case, 238 U. S., 260).

FIRST:

Defendant in error was within the act by reason of his general employment, as a separate and distinct ground from that based on the particular act in such employment he was doing at the moment of the accident or the commercial quality or office at the moment of the water he was pump-

ing. This is so clear and well settled as to render a certiorari unwarranted.

The distinction here pointed out was recognized in the Winters case (242 U. S., 253; 37 Sup. Ct. Rep., 170) where the employee was engaged as a machinist's helper making repairs to an engine. The court there said:

"This is not like the matter of repairs upon a road permanently devoted to commerce among the States. An engine as such is not permanently devoted to any kind of traffic and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for."

And also in the case of

Eng. v. Southern Pac. Co., 210 Fed., 92,

where the employee was engaged in framing a new office in a freight shed used for both kinds of commerce, the court saying:

"The principle seems to be that one employed at the time of his injuries in the use of or maintaining in proper condition *any instrumentality or appliance used by the carrier in interstate commerce comes within the statute although such instrumentality or appliance may also be used for intrastate busi-*

ness. Now freight sheds, depots and warehouses or other facilities provided and used by a carrier for receiving and handling and discharging interstate freight are, I take it, instrumentalities used in interstate commerce under the doctrine of the cases and are so closely connected therewith as to be a part thereof for the purpose of the Federal Employers' Liability Act."

In

Southern Railway Co. vs. Puckett, 244
U. S., 571; 37 Sup. Ct. Rep., 703;

the employee was carrying blocks on his shoulder to be used in jacking up a wrecked car on a track used for both kinds of commerce. While so carrying said blocks to the scene of the wreck he stumbled over some large clinkers and was injured. It was held that he was engaged in interstate commerce although his primary object was to rescue a fellow employee pinned beneath the car to be jacked up. The court said that notwithstanding the fact that his primary object was to rescue his fellow employee:

"his act, nevertheless, was the first step in clearing obstructions from the tracks to the end that the remaining cars for train No. 75 might be hauled over them and this work facilitated interstate transportation on the railroad, and that, consequently, he was en-

gaged in interstate commerce when injured
 * * * * * from the facts found it is plain that
 the object of clearing the track entered inseparably into the purpose of jacking up the
 car and gave to the operation the character
 of interstate commerce."

"The case is controlled by *Pedersen v. D. L. & W. R. Co.* (229 U. S., 146; 33 Sup. Ct. Rep., 640); *N. Y. C. & H. R. R. Co. v. Carr*, (238 U. S., 260, 263; 35 Sup. Ct. Rep., 780); *Penn. R. Co. v. Donat* (239 U. S., 50; 36 Sup. Ct. Rep., 4); *Louisville & N. R. Co. v. Parker*. (242 U. S., 13; 37 Sup. Ct. Rep., 4)."

An employee engaged in operating a pumping station which furnished water for use indiscriminately and contemporaneously to interstate and intrastate engines was engaged in interstate commerce within the meaning of the Federal Act. (*Roush v. Baltimore & Ohio R. Co.*, 243 Fed., 710). This is our case.

In

Thomas v. Boston N. R. R. Co., 219 Fed.,
 180;

a carpenter was engaged in tearing down a roundhouse used for both interstate and intrastate commerce. It was held that the roundhouse being a permanent instrumentality of both kinds of commerce, plaintiff was employed in interstate commerce.

In

Pittsburg C. C. & St. L. Ry. Co. vs.
Glynn, 219 Fed., 148;

plaintiff's intestate, a switchman, was struck and killed at night by the operation of a freight train running backwards at high speed while he was engaged in lining switches for his switch engine, the court said:

"At the moment the switch engine was not hauling any cars and so *the true character of the employment can be determined only by a broader view.* The evidence showed that the railroad company in and about these yards was continuously and indiscriminately hauling interstate and intrastate freight and that in this part of the work no distinction whatever was made between the two classes."

After reviewing the Pedersen (229 U. S., 166), Seale (220 U. S., 156), Zacharie (232 U. S., 248), Law (208 Fed., 869), Behrens (233 U. S., 473), and other cases, the court held that because the decedent employee was engaged generally in the operation of a switch engine, which, however, was not at the time specially engaged in an interstate function but only generally so, that said employee was within the act although the train which backed upon him and killed him was not an interstate train.

In

Coal & Coke R. Co. vs. Deal, 231 Fed.,
604;

a railroad employee was engaged in repairing telegraph and telephone lines which the railroad maintained as part of its equipment along its tracks for the purpose of transmitting orders for the movement of trains engaged in interstate commerce. The court held that he came within the act, saying:

“It is a matter of common knowledge that in order to successfully operate a railroad it is essential that the carrier should have a well-equipped telegraph and telephone line constructed and maintained near to and parallel with its tracks so as to enable its train dispatchers to transmit their orders and thereby keep the engineers and firemen properly advised as the relative positions of the respective trains. Under these circumstances a telephone or telegraph line is just as essential to the practical operation of the road as the tracks or any other particular part of the road’s equipment.”

This language applies not only to the telegraph and telephone lines and the tower which Collins was employed upon, and to the pump house and engine and tank he was engaged upon at the precise time of the accident, but also to the

water which he was pumping into the tank for immediate use of interstate engines.

In

Philadelphia, etc. R. Co. v. McConnell,
228 Fed., 263;

an employee was engaged as one of a crew in transporting or carrying away rails taken out of an interstate and intrastate track for the purpose of putting new ones in, which had been done. He was held within the act when injured while so engaged.

An employee was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act when injured while working about and upon an open coal dock engaged in supplying coal sent to engines moving in interstate commerce although some of them laid up over night at the dock and resumed their journey early the next morning. (*Guy v. Cincinnati & Northern R. Co.*, 166 N. W., 667, certiorari denied 246 U. S., 418).

An engineer who was injured while repairing a hoist used to fill coal boxes from which locomotives engaged in both kinds of commerce were coaled was within the Act. (*Sells v. Grand Trunk & Western R. Co.*, 206 Ill. App., 45, certiorari denied by Supreme Court).

There are other cases in the various State Courts holding likewise.

In

Guida v. Pa. R. Co., 171 N. Y. Supp., 285:
(affirmed, 224 N. Y., 174).

an employee was badly injured while cleaning soot from a boiler in the power plant of a railroad company generating electricity for the operation of trains on one road wholly in New York State and on another partly in New York and partly in New Jersey. Held that he was within the act.

In

Hargrove v. Gulf, Colorado & Santa Fe
R. Co., 202 S. W. 188;

it was held that an employee engaged in loading on flat cars old rails which had just been removed from an interstate railway line and replaced with new ones was engaged in interstate commerce.

In

Eskelsen v. Union Pac. R. Co., 167 N.
W., 408;

it was held that an employee employed at a trans-continental station handling interstate and intrastate baggage is within the act.

In

Denver & Rio Grande R. Co. v. Vekam,
165 Pac., 254;

it was held that a section hand was within the protection of the Federal Employers' Liability Act where he was killed while inspecting an interstate railway track and gathering up old rails from the side thereof.

Likewise it has been held that an employee engaged as one of a wrecking crew employed by an interstate carrier was within the act while engaged in removing a wreck of an interstate freight train and opening up the track used to carry both interstate and intrastate traffic. (*Denver & Rio Grande R. Co. vs. Wilson*, 163 Pac., 57).

An employee even only on his way to report for duty to go to such a wreck was held to be within the act. *In re Maroney* (188 N. E., 134).

Or while cleaning snow from an interstate track (*Morata v. Oregon, Washington R. & N. Co.*, (170 Pac., 291).

The general principle controlling has often been laid down by this court.

In the

Mondou case, (223 U. S., 1);

this court said an act was interstate if it had:

“a real or substantial connection with the interstate commerce in which the carriers and other employees are engaged.”

“Whether he was performing an act so directly and immediately connected with his previous act of placing the interstate cars in the F. B. yard as to be a part of it or a necessary incident thereto”,

was the test applied in the Welsh case (243 U. S., 303; 37 Sup. Ct. Rep., 116).

In the

Carr case (238 U. S., 260);

it was said:

“Each case must be decided in the light of the particular facts with a view of determining whether at the time of the injury the employee is engaged in interstate business or *in an act which is so directly and immediately connected with such business as substantially to form a part or necessary incident thereto.*”

And in the

Shanks case (239 U. S., 556; 36 Sup. Ct. Rep., 188);

the Supreme Court said:

“Was the employee at the time of the injury engaged in interstate transaction or *any work so closely related to it as to be practically a part of it.*”

From these cases illustrating the general principle applicable, as well as by the cases directly on the question previously reviewed, it is clear, we think, that Collins at the time of his injury was in general employment in interstate com-

nerce in that he had charge of and operated stationary and permanent instrumentalities of interstate commerce, viz: the tower, the telephone and telegraph lines, the switches, the gasoline engine and pump house and the tank, all of which were without question a part of the interstate commerce being carried on by the railroad company and necessary, certainly incidental, thereto. At the very moment of the accident he was operating one of these instrumentalities. He was as much an interstate employee as a station agent or a section hand engaged about the station or upon the roadbed or tracks used for both kinds of commerce. If an employee in charge of a station by the side of a track used for both kinds of commerce who happened to be injured while sweeping the floor, or performing any duty with reference to the station in keeping it in condition and repair, it would certainly be said that he was engaged in interstate commerce, although the dust he might be sweeping from the floor or the coal he might be putting into the stove, or the boards he might be nailing on the station to repair it would have no interstate quality in themselves. And so one engaged upon a track used for both kinds of commerce might be shoveling a landslide from the track, or removing rocks, which would have no interstate quality in themselves, yet it is clearly established that he would come within the act. In the Pedersen case the bolts the employee was carrying had no interstate quality in themselves, but the court took a broad-

er view and held that the employee was engaged generally upon a permanent instrumentality of both interstate and intrastate commerce, viz: the bridge and track, and therefore, he was within the act. In the Puckett case, *supra*, the blocks that the employee was carrying or the clinker he stumbled over had no interstate quality in themselves, but again the broader view was taken that the employee was engaged generally upon a permanent instrumentality of both kinds of commerce, viz: the track or roadbed, and, while the clearing of the same was not his primary object, still it was a necessary result of his work, therefore, he was within the act.

In the case at bar it was necessary that Collin's duties with reference to signaling, telegraphing, and telephoning should be done in order to properly carry on interstate commerce. It was also necessary that a water tank should be there and that it should be kept supplied with water for the interstate engines that passed, and also that there should be a pump house and a pump and a gasoline engine for the purpose of keeping the water tank supplied with water, and that should be operated in order that interstate engines could continue their interstate functions. Certainly all these things were necessary parts of and incidents to the interstate commerce carried on by the railroad company, and, that being so, the man who had charge of them and who was operating them and was engaged in such employment at the precise moment in operating the

gasoline engine to fill the tank with water supplying the interstate engines, was engaged in interstate commerce.

None of the cases cited by plaintiff in error hold to the contrary.

In the

Winters case (242 U. S., 253);

the employee was engaged as a machinist's helper making repairs upon an engine. The contention that he was employed in interstate commerce was based entirely on the alleged interstate quality of the engine at the precise time. That is that it was then actually functioning in interstate commerce. It appeared, however, that the engine was not being used in interstate commerce at the time nor that it was definitely ordered to be so used and no such definite purpose was shown. Its next function might be either intrastate or interstate. As the court in that case pointed out it was "*not like the matter of repairs upon a road permanently devoted to commerce among the States.*"

In the

Shanks case (239 U. S., 556; 36 Sup. Ct. Rep., 188);

cited by counsel, the employee was working in a machine shop repairing parts of locomotives. There was no contention that his general employ-

ment was interstate, and it was simply held that the mere fact that he was repairing parts of locomotives did not make his employment interstate where there was no special interstate quality shown in the parts he was at the moment employed upon, even although he might sometimes be employed on the parts of an interstate engine.

The Barlow case (244 U. S., 183; 37 Sup. Ct. Rep., 515), the Harrington case (241 U. S., 177) and the Yurkonis case (238 U. S., 459) cited by counsel all had to do with the handling of coal. There was no contention in any of them *that the general employment of the employee was interstate.*

In the Yurkonis case the coal the employee was working on, was simply being mined. It was said that the

“mere fact that the coal might be used or was intended to be used in the conduct of interstate commerce or the fact the same was mined for transport did not make the injury received by the plaintiff one received while he was engaged in interstate commerce.”

Of course, the miners had no interstate employment like Collins in the case at bar, generally speaking. They were simply miners of coal. The contention that the employment was interstate had to be based entirely upon the interstate quality of the coal at the time and it had none, neither had the mines nor the miners. Neither was there

any certain or immediate use of the coal in interstate commerce in view. It might be so used and it might not.

In the Barlow case the employee was engaged as a member of a switching crew assisting in placing on an unloading trestle in the yards coal cars belonging to the company loaded with supply coal for it which, while they had come from without the State, had remained in the yards upon sidings for several days before removal to the trestle. It was sought to make the employment interstate because the coal had been brought from without the State. It was held that this interstate function had ended several days before, the court saying:

“We think their interstate movement terminated before the cars left the sidings and that while removing them the switching crew was not employed in interstate commerce.”

In that case also there was no contention that the employee was by his general employment engaged in interstate commerce.

In the Harrington case (241 U. S., 177), plaintiff's intestate was killed while removing coal from storage tracks to the coal shed or chutes. The coal was for use by the railroad company itself. It had been brought to the storage tracks sometime before. The court said with reference to that movement:

“With the movement of the coal ^{to} ~~from~~ the storage tracks, however, we are not concerned. That movement had long since ended.”

The question turned entirely upon the use the coal was afterwards to be put to. It was to be placed in the bins or chutes to be taken as needed by locomotives of all classes engaged in both interstate and intrastate traffic. Nobody could tell at what future time the coal would be used, if at all, nor could it be told with any degree of certainty whether the particular coal interstate was moving would be used in interstate or intrastate engines. It being a concrete and separable commodity, unlike water, all the coal that interstate was working upon at the time might eventually be used entirely for intrastate traffic.

Then, again, the future use was remote, which was sufficient in itself to lend a degree of uncertainty to the future uses. At least, that must be the consideration which the court has given to remoteness. The court said:

“Manifestly, there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes. This was nothing more than the putting of the coal supply in a convenient place from which it could be taken as required for use.”

This language does not apply at all to the thing Collins was doing in the case at bar while

he was starting the engine to pump water into the tank for immediate use by waiting interstate engines.

But the chief distinction we desire to point out between the Harrington case and the case at bar at this point is that the interstate in the Harrington case was not engaged in a general interstate employment. His duty in relation to interstate commerce was controlled entirely by the interstate quality of the thing he was working on for the time being. He was engaged at one moment in an interstate function, and the next, perhaps, in an intrastate function. He was not a regular attachée in his duties to a permanent stationary instrumentality of commerce. His duties were not confined to such instrumentality, or such instrumentalities used for both kinds of commerce.

In the case at bar it is entirely different. Collins was engaged exclusively in the management and operation of these permanent instrumentalities of interstate commerce, or, rather, both kinds of commerce, which is sufficient, including the gasoline engine he was working on at the time of his injury.

In the Kelly case (238 Fed. 95) cited by counsel, the employee was not at the time he was injured engaged on the coal chutes or roundhouse but was walking from the tower where he had been toward the place where other employees were so employed. He was walking in the middle of the track or close alongside it and was run

over by a train. The decision was founded on the Harrington case and has no application here. If so it is not good law. Certainly it is no authority that one employed generally and permanently in caring for and working upon a permanent instrumentality of interstate commerce is not within the act. Or where either the general employment, as distinguished from the particular act the employee was doing at the time, was interstate, or where the work is upon a permanent instrumentality of both kinds of commerce.

SECOND:

It has been held below also that the water itself had such an interstate quality by reason of its present movement and uses as to come within the act, and this is plainly correct, although this does not matter, if we are clearly right on the foregoing point.

The character of the thing,—that is, water—upon which the employee was engaged is material to consider here. In the Barlow, Harrington, and Yurkonis cases the thing being handled was coal. That is a tangible article, concrete in its separability. Unless the employee were actually putting coal into an engine which was interstate it cannot be said that the future use of the coal is shown with imminence and certainty; that is whether it is being or will ever be used in interstate commerce, and even such future use appear, still it may be too remote. No one could say with certainty that the coal a miner is mining at the mine,

for instance, would ever be used in interstate commerce. In the first place it is tangible and separable and might all be used in one or the other kind of commerce. And secondly, owing to remoteness it might not be used in either. One handling coal at the chutes for use of the railroad company not loading it upon an interstate engine at the precise time, cannot be said to be shown with certainty to be engaged in interstate commerce because, also, the future use of the coal is indefinite, remote and uncertain and all of it that he might be handling at the time of the injury might be used for one or the other kind of commerce or not in either.

Water is intangible and inseparable. It has a oneness which does not permit of the distinction drawn with reference to coal. Such distinction fades away with its intangibility and inconcrete inseparability. While engines engaged in both kinds of commerce constantly took water from the tank it cannot be said that some of them might take the precise water that the employee was pumping at the time and others not. The use of the water for interstate commerce, therefore, appears with certainty. The distinction drawn in the case of tangible and concretely separable articles of freightage or handling cannot be applied to water.

Furthermore in all the cases treating of the movement and handling of coal the coal was being handled either at the mine or in, or being taken to, the chutes. There was no showing that it

was in process of being loaded into engines for the purpose of use there. Here the case is different. The water was in process of being put into the engines. The tank was merely an instrument constituting part of the course of the water from the pump to the engines. The interstate engines were there not only at the precise time, but regularly going to the tank in the course of movements in interstate commerce then going on to take water. It was the same as if Collins were pumping the water into an interstate engine. He was pumping it into a tank from which interstate engines took it and in fact were taking it at the time, several engines being present and taking water. No remoteness here and interstate use was present, immediate and direct.

A case squarely in point is

Roush v. Baltimore & Ohio, 243 Fed.,
712.

In that case the employee was engaged in operating a pumping station which furnished water for use indiscriminately and contemporaneously to engines engaged in both interstate and intrastate commerce. It was held that he came within the act.

In

Hudson & M. R. Co. v. Iorio, 239 Fed.,
855;

cited against us, the employee was engaged in sorting rails which might be used in relaying tracks over which interstate commerce was carried, and the court held that the interstate commerce was going on and could be continued regardless of the work which plaintiff was doing at the time and that the mere probability of future use of the materials in interstate commerce did not show work so closely connected with interstate commerce as to be within the act, saying, among other things:

“We, therefore, hold that the actual employment or use at the moment of injury of the thing upon which the person injured was working is the test of applicability of the statute.”

Of course, the court was then speaking not of water but of tangible and concrete articles of freightage or handling, and in that case it did not appear what the rails were to be used for with any degree of certainty or nearness. Here, it is shown with certainty that the water not only was to be but was being used by interstate and intrastate engines, no distinction in that respect being possible, and, of course, it is unnecessary to urge that interstate commerce cannot be carried on unless locomotives are supplied with water. The act of filling the water tank was necessary for the immediate use of locomotives there engaged in interstate commerce.

POINT III.

The application should be denied.

HAMILTON WARD,
Attorney for Defendant in Error,
104-105 Erie Co. Bank Bldg.,
Buffalo, N. Y.

IRVING W. COLE,
Of Counsel.

Office Supreme Court,
FILED

DEC 27 1919

JAMES D. MAHER

Supreme Court of the United States
OCTOBER TERM, 1919.

No. 348

ERIE RAILROAD COMPANY

PLAINTIFF IN ERROR,

against

WILLIAM M. COLLINS

DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR

MOOT, SPRAGUE, BROWNELL & MARCY,
Attorneys for Plaintiff in Error.

ADELBERT MOOT,
Of Counsel.



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Supreme Court of the United States

ERIE RAILROAD COMPANY,
Plaintiff in Error,

AGAINST

WILLIAM M. COLLINS,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

STATEMENT:

Writ of certiorari to the Circuit Court of Appeals, Second Circuit, to review a judgment of that Court entered on the 9th day of February, 1919, affirming a judgment of the District Court of the United States for the Western District of New York in favor of William M. Collins and against the Erie Railroad Company, in the sum of \$15,-045.66 entered on the 6th day of April, 1918.

The opinion of Hon. John R. Hazel, District Judge, on overruling the demurrer of the defendant to the plaintiff's complaint on the ground that the complaint does not state facts sufficient to constitute a cause of action, is printed at page 9 of the record.

The opinion of Hon. Edward S. Thomas, District Judge, on denying the motion of the defendant to set aside the verdict and for a new trial is printed at page 206-a of the record.

The opinion of the Circuit Court of Appeals written by Hon. Henry Wade Rogers and concurred in by Hon. Martin T. Manton, is printed at page 236 of the record. From the opinion of the Court Hon. Charles M. Hough dissented.

Shortly after the decision in the Collins case and when the court was composed of Presiding Judge Rogers and Judges Hand and Hough came for review the judgment in the action of Szary against Erie Railroad Company which had been tried before Judge Manton. Szary's duties consisted of the drying of sand, the screening of it, the storage of it and the supplying of it from the storage bin to locomotives. The Circuit Court of Appeals decided that Szary was employed in interstate commerce. Judge Hand stated his reason for reaching this conclusion as follows:

“The case of *Collins against the Erie Railroad Company* is, in my judgment, quite indistinguishable from the case at bar. It was argued earlier than this case before a court differently organized and was in fact decided earlier, although the decision had not been handed down. It seems to me that it should control here and I agree to affirm upon its authority. As a matter of first impression I

confess I should have thought both cases within the doctrine of *C. B. & Q. R. R. Co. vs. Harrington*, 241 U. S. 177."

In the *Szary* case, Judge Hough said:

"I agree to affirmance for the reasons above stated. Judge Hand's memorandum also sufficiently indicates the ground of my dissent in the *Collins* case."

PLEADINGS:

The complaint alleges that the plaintiff, while employed in and while the defendant was engaged in interstate commerce was injured through the negligence of the defendant, his employer, and demands damages in the sum of \$25,000.00. After the demurrer of the defendant was overruled the defendant interposed an answer which admits the incorporation and operation of the Erie Railroad Company denies the other allegations of the complaint, sets up the partial defense of contributory negligence and the defense of assumed risk.

ASSIGNMENTS OF ERROR:

V. In denying the motion for a nonsuit by the Erie Railroad Company as follows:

"Defendant's Counsel: Defendant moves for a nonsuit on the ground that at the time of the plaintiff's injury the plaintiff was not employed in interstate commerce, within the

meaning of that term as used in the Federal Employers' Liability Act, and that, therefore, this court has no jurisdiction of this action.

* * * * *

Defendant's Counsel: Exception to the denial of the motion." (Pages 215, 216, Fols. 860, 861, 864.)

VI. In denying the motion for a nonsuit and in denying the motion for a direction of a verdict in favor of the defendant, made by the Erie Railroad Company at the close of all the evidence, as follows:

"Defendant's Counsel: I renew the motion made at the close of the plaintiff's case, on all the grounds stated at that time—in the motion for a nonsuit, and on the same grounds I ask your Honor to direct a verdict in favor of the defendant of 'No cause of action.'

The Court: Motion denied.

Defendant's Counsel: Exception. That is each motion is denied, and I have the exception to each denial!

The Court: Yes." (Pages 216, 217, Fols. 864-866.)

IX. In charging the jury, at the request of counsel for the plaintiff, as follows:

"Plaintiff's Counsel: I ask your Honor to charge the jury on the subject of damages, that in addition to the earning capacity, and

in addition to the pain and suffering, it is their duty to award the plaintiff damages,—if he is entitled to damages,—for the disfigurement and physical impairment, if they should find that same exists.

The Court: For any physical impairment,—the jury should take that into the consideration. I so charge.

Defendant's Counsel: Exception.

Plaintiff's Counsel: Does your Honor decline as to the disfigurement?

The Court: I am in doubt about it.

Defendant's Counsel: I think your Honor has fully covered it.

Plaintiff's Counsel: I will press my request that any disfigurement which causes the plaintiff shame and humiliation is a measure of damages.

The Court: Do you press it.

Plaintiff's Counsel: Yes, sir, I do.

The Court: Then I so charge.

Defendant's Counsel: Exception.

The Court: Exception noted." (Page 218, Fols. 869-872.)

POINT I.

At the time of his injury Collins was not employed in interstate commerce within the meaning of that term as used in the Federal Employers' Liability Act.

The Erie Railroad Company operates a railroad system extending through a number of states and made up of a number of divisions on one of which divisions extending from Hornell in the State of New York to Buffalo in the State of New York at a point in the Town of Burns, Collins was employed.

Mr. Collins was burned by the ignition of gasoline which he was using in the operation of a gasoline engine by which water was pumped from the ground into a tank from which it flowed into locomotives, some of which were engaged in hauling intrastate commerce and some of which were engaged in hauling interstate commerce (Page 155, Fols. 619, 620).

At the place of Collins' employment the railroad company has upon its right of way three structures, a tower, a pump house forty feet east of the tower, and a water tank 1,000 feet east of the pump house (Page 159, Fol. 636).

Collins' duties, classified according to the place of their performance, were as follows:

A. At the tower—communication by telephone with the dispatcher; reporting the arrival, passing and departing of trains to him and the receipt from him of directions with reference to those trains (Page 36, Fols. 141, 144).

B. On the ground in the vicinity of the tower—throwing switches to facilitate the passage of trains (Page 36, Fol. 141).

C. In the pump house—the operation of the gasoline engine by which water was pumped from the earth into a tank from which it flowed into engines, some of which were employed in intrastate commerce and some of which were employed in interstate commerce (Page 33, Fol. 129; Page 35, Fol. 140).

The employe's work in the operation of the gasoline engine and pump was easily separable from his other duties, none of which was performed in the pump house in which the gasoline engine was located.

The character of his employment at the time of his injury whether interstate or intrastate, depends upon the work in which he, at the time, was engaged.

This test of the character of the plaintiff's employment is recognized by Circuit Judge Rogers who, in his opinion in this case, says:

“The character of the plaintiff's employment at the time of his injury, whether interstate or intrastate, depends upon the character of the work in which he was at that time engaged.”

Erie Railroad Company vs. Collins, Circuit Court of Appeals, Second Circuit.

In an action growing out of an injury to an employe while he was assisting in clearing up a

wreck, the Supreme Court in deciding the question of the character of his employment, said:

“Of course, we attribute no significance to the fact that plaintiff had been engaged in inspecting interstate commerce before he was called aside by the occurrence of the collision.”

Southern Railroad Company vs. Puckett,
244 U. S. 571, at page 574.

In an action brought to recover on account of an injury received by an employee while switching cars moving in intrastate commerce, whose work included switching cars moving in interstate commerce, the Supreme Court said:

“Giving to the words ‘suffering injury while he is employed by such carrier in such commerce’ their material meaning, as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employee is engaged is a part of interstate commerce. * * * *

“Here, at the time of the fatal injury the interstate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another. That was not a service in interstate commerce and so the injury and resulting death were not within the statute. That he was expected, upon the com-

pletion of that task, to engage in another which would have been a part of interstate commerce is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury.”

Illinois Central R. R. Co. vs. Behrens,
233 U. S., 473, at page 478.

In an action brought to recover for injuries received by the employe while in quest of orders which when received would have required him immediately to make up an interstate train, the Supreme Court said:

“By the terms of the Employers’ Liability Act the true test is the nature of the work being done at the time of the injury and the mere expectation that plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the act.”

Erie Railroad Co. vs. Welsh, 242 U. S.,
303, at page 306.

At the time of his injury Collins was employed in pumping water from the earth into a tank one thousand feet distant, from which it would flow into locomotives, some engaged in interstate commerce and some engaged in intrastate commerce (Fols. 619, 620). Collins had no duty with reference to taking water from the tank to the engines

—that work was done by the engine crew (Fols. 155, 156). The pump which Collins was operating when injured accomplished two things—it drew the water from the earth and it placed it in a tank, conveniently located, from which it might flow into locomotives.

His Honor, Justice Brandeis, in the introductory part of his dissenting opinion in the Winfield case, and there is nothing in the opinion of the court in conflict with it, says:

“Later decisions disclose how large a part of the injuries resulting from the railroads’ negligence are thus excluded from the operation of the Federal law. For the act was held to apply only to those *directly* engaged in interstate commerce. This excludes not only those engaged in interstate commerce, but also the many who—while engaged on work *for* interstate commerce as in repairing engines or cars—are not *directly* engaged *in* it. Likewise it excludes employees who, though habitually engaged directly in interstate commerce, *happen* to be injured or killed through the railroads’ negligence, while performing some work in intrastate commerce.”

New York Central R. R. Co. vs. Winfield, 244 U. S., 147, at page 163. The italics appear in the officially reported opinion.

The U. S. Supreme Court has held that a person employed in mining coal for use by his employer on locomotives engaged in interstate commerce was not employed in such commerce. The court said:

“In the course of the trial, during examination of the witness, while evidence was being offered to show the disposition of the coal mined, counsel for defendant stated that it used the coal mined in its locomotives in interstate commerce.

* * * * *

“The mere fact that the coal might be or was intended to be used in the conduct of interstate commerce, after the same was mined and transported, did not make the injury one received by the plaintiff while he was engaged in interstate commerce.”

D. L. & W. vs. Yurkonis, 238 U. S., 439.

Collins, like Yurkonis, at the time of injury was employed in extracting from the earth an article for consumption by the instrumentalities of commerce. If the miner of coal for use in interstate commerce was not employed in that commerce, then the drawer of water for a like purpose, was not employed in interstate commerce.

In its opinion the Supreme Court refers to the circumstance of the transportation of the coal

after it was mined. This reference, however, is without significance. The work of the miner does not become a part of interstate commerce merely because his employer does not transport the coal which is mined before it is consumed in interstate commerce. If the element of the transportation of the coal were the decisive factor, we would have the curious situation of a miner employed in interstate commerce when his employer, at the mouth of the pit, turned the coal into motive power for hauling interstate commerce, and not employed in interstate commerce if his employer found it necessary to transport the coal before it was consumed in such commerce.

If a railroad company employed an engineer to pump water from the earth at a distance from its right of way and transported the water by cars of a pipe line to a water tank upon its right of way, for use there upon engines engaged in interstate commerce, we would have a situation exactly like the one presented to the court in the *Yurkonis* case. On principle the court must reach the conclusion that the engineer pumping the water has no closer relationship to interstate commerce than the coal miner has in mining coal for use in interstate commerce, in pumping water for use in interstate commerce, the character of the employment, whether interstate or not, does not depend upon the remoteness of the source of supply from the point of use or of its proximity thereto. The pumping engineer, not employed in interstate commerce when drawing water from the earth at a

point remote from the railroad, for use upon it in interstate commerce, does not become employed in that commerce when the location of his place of employment approaches the railroad company's right of way.

In addition to drawing the water from the earth, the engine operated by Collins placed the water in a tank from which it could be taken with convenience, as required for use. This phase of the work was analogous to that done by the injured employee in *C. B. & Q. vs. Harrington* (241 U. S. 177), who, when injured, was placing cars of coal on a trestle from which it could be unloaded through chutes to the tenders of locomotives.

In the Harrington case the U. S. Supreme Court, on the assumption that all the locomotives which were supplied with coal from the chutes on which Harrington, when injured, was placing the cars of coal for unloading, were engaged in interstate commerce, said:

“That duty was solely in connection with the removal of the coal from the storage tracks to the coal shed or chutes, and the only ground for invoking the Federal Act is that the coal thus placed was to be used by locomotives in interstate hauls.

“As we have pointed out, the Federal Act speaks of interstate commerce in a practical sense suited to the occasion and ‘the true test

of employment in such commerce in the sense intended is, was the employe at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it.' *Shanks vs. D. L. & W. R. R.*, 239 U. S., 556, 558, and cases there cited. Manifestly, there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes. This was nothing more than the putting of the coal supply in a convenient place from which it could be taken as required for use. It has been held that an employee of the carrier while he is mining coal in the carrier's colliery intended to be used by its interstate locomotives is not engaged in interstate commerce within the meaning of the Federal Act (*D. L. & W. R. R. vs. Yurkonis*, 238 U. S., 439), and there is no distinction in principle between the two cases. In *Great Northern Ry. vs. Knapp*, 240 U. S., 474, the question whether the employee was engaged in interstate commerce was not presented, as the application of the Federal statute was conceded in the State Court."

If, the mining of coal for use on locomotives hauling interstate commerce and the placing of it in a convenient place for loading on locomotives hauling such commerce, had been done by one man instead of by many, his work would not have possessed the character of interstate commerce, when

the same work performed by many in succession lacked that character. So with Collins. The performance by him of the work of extracting the water from the earth, similar to the work performed by Yurkonis, coupled with the performance by him of the work of placing the water in a convenient place for use, similar to the work performed by Harrington, did not bring him into such a close or direct relation with interstate transportation as to make his work practically a part of it.

The claimant, in *Barlow vs. the Lehigh Valley* (244 U. S., 183), when injured was performing work similar to that performed by Harrington, but the U. S. Supreme Court held that the work had not that intimate relation to interstate commerce required for the application of the Federal Employers' Liability Act.

It is argued by Collins' counsel that without the service which Collins was rendering when injured, commerce would be seriously interrupted, if it did not cease. Commerce would not continue without machine shops for the repair of cars and locomotives, but the courts have held that employment in the shops in which cars and locomotives which hauled interstate commerce were repaired, was not a part of interstate commerce.

D. L. & W. R. R. Co. vs. Shanks, 239 U. S., 556.

Commerce would not continue if the railroads were without round houses for the storing, clean-

ing and preparation of locomotives, but the man who rebuilds the round house in order that its use may be continued for caring for locomotives which haul interstate commerce, is not employed in that commerce.

Kelly vs. Pennsylvania R. R. Co., 238 Fed., 95.

It is essential to the continuance of interstate commerce that the engines which haul it and the cars which carry it be repaired, which can be done most conveniently when they are temporarily withdrawn from service, but one injured while making such repairs upon these instrumentalities of commerce while temporarily withdrawn from service, is not employed in interstate commerce, even though the instrumentality, both before and after the repair, is used in such commerce.

M. & S. R. Co. vs. Winters, 242 U. S., 353.

In the *Collins* case the Circuit Court of Appeals accepted as a precedent for its decision the *Pedersen* case (*Pedersen vs. D. L. & W.*, 229 U. S., 146) rather than the *Yurkonis* and *Harrington* cases. It rejected the precedent of the *Yurkonis* case saying that the use of the mined coal in interstate commerce "was neither certain nor immediate," overlooking the admission of the defendant contained in the case that "it used the coal mined in its locomotives in interstate commerce."

Attempting to distinguish the Harrington case from the Collins case the Circuit Court said that the acts analagous to those of Collins were not the ones performed by Harrington and his associates in the placement of the car upon the trestle above the chutes into which the coal was unloaded and from which it was taken by the crews of engines employed in interstate commerce, but were the acts of those who dumped the cars placed upon the trestle into the coal pockets. The dumping of the coal from the cars into the pockets is one step in the work *for* commerce nearer to interstate commerce itself than is the placement of the car upon the trestle. We know of no decision, however, that the work of dumping the cars into the chutes *is* work in interstate commerce and not work *for* commerce.

As we follow to its logical conclusion the line of reasoning adopted by the Circuit Court of Appeals in the Collins case, that the unloading of the coal into the coal pockets is work in interstate commerce, then the coal trestle and the coal pockets are instrumentalities of interstate commerce and the repair of those instrumentalities while in use in such commerce is employment in such commerce. The United States Supreme Court, with reference to such repair work, has held that it is not employment in interstate commerce.

To the dependents of a carpenter killed while at work in the repair of coal pockets in use for

supplying coal to locomotives engaged in interstate commerce the Industrial Commission of the State of New York made an award under the Workmen's Compensation Act. The award was opposed by the employer, the New York Central Railroad, on the ground that his death occurred while he was employed in interstate commerce and that, therefore, his sole remedy was under the Federal Employers' Liability Act.

The award made was affirmed in the Appellate Division of the Supreme Court of the State of New York.

Gallagher vs. New York Central R. R. Co., 180 A. D., 88.

The judgment of affirmance by the Appellate Division was affirmed unanimously in the Court of Appeals.

Gallagher vs. New York Central R. R. Co., 222 N. Y., 649.

An application to this court by the employer for a writ of certiorari was denied.

New York Central vs. Gallagher, 248 U. S., 559.

The opinion of the Appellate Division of the Supreme Court in the Gallagher case shows a keener perception of the line of demarcation between work *in* interstate commerce and work *for*

commerce and of the trend of decisions in the Supreme Court of the United States than did the Circuit Court of Appeals when it drew that line of demarcation between the acts of those who placed the cars of coal upon the trestle and the acts of those who unloaded the cars so placed into the pockets.

From the opinion of the Appellate Division we quote:

“The appellant contends that the intestate was engaged in repairing an instrumentality of interstate commerce and, therefore, that the Workmen’s Compensation Law (Consol. Laws, Chap. 67 (Laws of 1914, Chap. 41), as amd.) has no application. The decedent was a carpenter, in the general employ of the complaint, and at the time he met his death he was repairing its coal pockets, about half a mile north of Ravena, on a side track. Coal from the pockets was used from time to time for locomotives engaged in interstate or intrastate commerce as desired.

“It is unprofitable to comment upon the numerous decisions bearing upon this question. A late decision of the Circuit Court of Appeals, Third Circuit, seems to be nearly on all fours with this case and decisive of it. *Kelly v. Pennsylvania Railroad Co.* (238 Fed. Rep. 95) involved the case of a carpenter who had been sent to repair a coal chute, and while on the way to the chute he

stopped to direct the movement of a car of lumber from a storage track to the chute, for use upon the chute, and was injured. It was held that he was not engaged in interstate commerce at the time of the accident. If he was handling lumber to use in repairing the chute, he was to all intents and purposes repairing the chute, as the furnishing of the lumber was a necessary incident to the repairs.

“Some of the cases go quite far in holding that the repairs of a railroad track used for the passage of interstate commerce is an employment in interstate commerce. The later cases seem to indicate that that reasoning is not to be extended, and the *Barlow* case (*Lehigh Valley R. R. Co. v. Barlow*, 244 U. S. 183) and other late cases seem to indicate that the rule is satisfied by limiting it to the track which is a direct instrumentality of interstate commerce.”

The Industrial Commission of the State of New York made an award to the dependents of one whose death resulted from injuries received while he was repairing a passenger station at which persons traveling in interstate commerce were received. His employer, the railroad corporation, challenged the award on the ground that the decedent when injured was employed in interstate commerce. The Appellate Division of the Supreme Court reversed the award.

Vollmers vs. New York Central, 180 A. D., 60.

The award was reinstated by the Court of Appeals on the authority of *Shanks vs. The D. L. & W. R. R. Co.*, 214 N. Y., 413; 239 U. S., 556, and *Gallagher vs. New York Central* (supra).

Vollmers vs. New York Central, 223 N. Y., 571.

The decisions in the *Gallagher* and *Vollmers* cases compel the conclusion that the repair of the pump house in which the gasoline engine which Collins operated was located, or the repair of that engine itself, would not have been employment in interstate commerce. If the repair of the engine while in use or located for use was not employment in interstate commerce, it is difficult to reach the conclusion that priming of the engine for operation was such employment.

The erection and maintenance of the structures in which the instrumentalities of commerce are built, repaired and housed, the construction and repair of the instrumentalities of commerce, the procurement and placing for convenient use of the articles consumed in commerce, when they have relationship to interstate commerce are properly classified as work *for* interstate commerce and not as work *in* interstate commerce.

POINT II.

The erroneous instruction of the court that plaintiff was entitled to recover for "shame and humiliation" felt by him resulted in an outrageously excessive verdict.

This point was raised by defendant's exception to the erroneous charge (Fol. 803) and is included in assignment of error No. 9.

At the time of his injury the plaintiff was twenty-two years of age and had received the substantial equivalent of a high school education. His injuries consisted of burns on the ears, face, neck and hands. The jury awarded him Fifteen thousand dollars (\$15,000.00).

Unquestionably, if the defendant is liable, the plaintiff is entitled to compensation for bodily impairment, pain and suffering, both mental and physical, due *directly* to the injury and for loss of earnings.

There is in this case no evidence tending to show a substantial loss of earnings. For a time subsequent to his injury plaintiff was unable to work at all and for that comparatively brief period there was a total loss of earnings. The plaintiff's wages at the time of his injury, were approximately Fifty dollars (\$50.00) a month. Prior to his injury the plaintiff had prepared the

way to leaving the employment of the Erie to take a position with the United States Government. In the way of preparation he had obtained a position on an eligible list prepared by the Federal Civil Service Commission from which since his injury, he was appointed to the Federal Postal Service. In the Federal service his compensation for the time he worked was greater than for an equal time in the employment of the Erie. He has been drafted from his employment in the Post-office Department of the Federal Government into the military service but had he remained with the Erie, physically unimpaired, he would have been subject to the provisions of the draft law. It appears, therefore, as a fact supported by proof on the trial, that the earning capacity of the plaintiff has not been diminished by the injuries he received.

There has been a kindly healing of the wounds with a partial inability to flex the thumb of the right hand and with a tendency of the scar tissue of the face to chap and to cause pain in extremely cold weather. The plaintiff's usual employment has not been, and probably never will be, out of doors. The days of severe cold weather in a winter in the locality in which the plaintiff resided when injured are few. In this respect perhaps a little more precaution in the way of protection will be required from him than from others, but the discomfort or inconvenience of these few cold days each winter are not measura-

ble. The plaintiff referred indefinitely to some difficulty of hearing, but the plaintiff admitted that when examined for the draft in the summer of 1917, he made no complaint to the examining surgeon of any impairment of his hearing. The court will also note that the physician who testified at the trial on behalf of the plaintiff, confined this impairment of hearing almost, if not wholly, to difficulty in gathering the volume of sound.

The absence of other elements of damage which would form a basis for the verdict rendered leads to the conclusion that the outrageously large verdict of the jury was induced by the plaintiff's request to charge, urged upon the court, as appears in the following colloquy:

“Plaintiff's Counsel: I ask your Honor to charge the jury on the subject of damages that in addition to the earning capacity and in addition to the pain and suffering, it is their duty to award the plaintiff damages—if he is entitled to damages—for the disfigurement and physical impairment, if they should find that same exists.

The Court: For any physical impairment—the jury should take that into consideration. I so charge.

Defendant's Counsel: Exception.

Plaintiff's Counsel: Does your Honor decline as to the disfigurement.

The Court: I am in doubt about it.

Defendant's Counsel: I think your Honor has fully covered it.

Plaintiff's Counsel: *I will press my request that any disfigurement which causes the plaintiff shame and humiliation is a measure of damages.*

The Court: Do you press it?

Plaintiff's Counsel: Yes, sir, I do.

The Court: Then I so charge.

Defendant's Counsel: Exception.

The Court: Exception noted."

Testimony relating to this improperly considered element of damage came into the case over the objection and exception of defendant's counsel, in the following answer:

"A. It is very humiliating to be out in company or any place where people notice you and make you feel kind of embarrassed watching you all the time." (Fols. 232, 233).

The doubt expressed by the court as to the correctness of the requested charge finds ample support in judicial decisions.

Judge Sanborn, member of the Circuit Court of Appeals, Eighth Circuit, the soundness of whose judgment is challenged, wrote upon this question as follows:

"It is assigned as error that at the trial of the action, more than 15 months after the

accident, in answer to questions of his counsel relative to the effect upon his mind at that time of the injury to his leg, the plaintiff testified that the fact that other people looked down upon him because he was crippled, and seemed to shun him, made him feel very badly and distressed him mentally. There is a conflict of authority upon the question which this assignment presents. In some states, notably in Wisconsin and Michigan, evidence of mental pain caused by disfigurement apart, from the physical suffering produced by an injury, is admissible to enhance the damages in an action for personal injury. *Heddles v. Chicago & N. W. Ry. Co.* (Wis.) 46 N. W. 115, 116, 20 Am. St. Rep. 106, and cases there cited; *Sherwood v. Chicago & W. M. Ry. Co.* (Mich.) 46 N. W. 773, 776. The rule which has been adopted by this court, however, and the rule which seems to us the better one, is that in actions for personal injury the plaintiff may recover for the bodily suffering and the mental pain which are inseparable and which necessarily and inevitably result from the injury. But mortification or distress of mind from the contemplation of the crippled condition and of its effect upon the esteem of his fellows, that mental pain which is separable from the physical suffering caused by the injury, is too remote, indefinite, and intangible to constitute an element of the damages in such a

case, and evidence of it is inadmissible. *Chicago, R. I. & P. Ry. Co. v. Caulfield*, 63 Fed. 396, 399, 11 C. C. A., 552, 555; *Kennon v. Gilmer*, 131 U. S. 22, 26, 9 Sup. Ct. 696, 33 L. Ed. 110; *Bovee v. Danville*, 53 Vt. 183; *C. B. & Q. R. Co. v. Hines*, 45 Ill. App. 299, 302, 303; *City of Saline v. Trosper*, 27 Kan. 544, 565; *Dorrah v. Railway Co.*, 65 Miss. 14, 3 South. 36, 7 Am. St. Rep. 629; *Railway Co. v. Stables*, 62 Ill. 313, 321; *Joch v. Dankwardt*, 85 Ill. 331; 332; *Johnson v. Wells Fargo & Co.*, 6 Nev., 224, 236, 3 Am. Rep. 245. Mental pain of this character, the suffering from injured feelings, is intangible, incapable of test or trial. The evidence of it, like that which convicted the alleged witches, rests entirely in the belief of the sufferer, and it is not susceptible of contradiction or rebuttal. Many other causes, the education, temperament, and sentiment of the suffered, the mental attitude, the acts and words, of his friends and acquaintances, concur with the accident to cause this mental distress, in such a way that it is impossible to separate and ascribe the proper part of it to the injury caused by the defendant. And the amount of the mental pain caused by any disfigurement necessarily varies so with the character, temperament, and circumstances of the injured person that no just measure of the damages from it can be found. Such mental suffering is too remote,

intangible, and immeasurable to form the basis to any just adjudication, and the objections to the testimony of the plaintiff concerning it should have been sustained."

Southern Pacific Company vs. Hetzer,
135 Federal Reporter, 272.

Mr. Justice Gray, writing for the Supreme Court of the United States, said:

"The action is for an injury to the person of an intelligent being; and when the injury, whether caused by wilfulness or by negligence, produces mental as well as bodily anguish and suffering, **INDEPENDENTLY OF ANY EXTRANEOUS CONSIDERATION OR CAUSE**, it is impossible to exclude the mental suffering in estimating the extent of the personal injury for which compensation is to be awarded."

Kennon vs. Gilmer, 131 U. S. 22, at page 26.

In an opinion of the United States Supreme Court, written by Mr. Justice Day, it is said:

Furthermore, an objection is taken to the charge as to mental suffering past and future. It is objected that this instruction permits a recovery for future humiliation and embarrassment of mind and feeling because of the loss of the leg but we find no object to charge

as given in this respect. The court said: 'The jury are to consider mental suffering past and future, **FOUND TO BE THE NECESSARY CONSEQUENCES OF THE LOSS OF HIS LEG.**' WHERE SUCH MENTAL SUFFERING IS A DIRECT AND NECESSARY CONSEQUENCE OF THE PHYSICAL INJURY WE THINK THE JURY MAY CONSIDER IT. It is not unlikely that the court might have given more ample instruction in this respect had it been requested so to do but what was said LIMITED THE CONSIDERATION TO THE DIRECT CONSEQUENCES OF PHYSICAL INJURIES.

"An instruction of this character was sustained in *Washington & Georgetown R. R. Co. vs. Harmon*, 147 U. S. 571, 588, that there might be more or less continuous mental suffering directly resulting from a maiming of the plaintiff's person in an injury of this character was probable, AND WHERE THE JURY WAS LIMITED TO THAT WHICH NECESSARILY RESULTED FROM THE INJURY, WE THINK THERE CAN BE NO VALID OBJECTION OR JUST GROUND OF COMPLAINT."

McDermott v. Severe, 202 U. S. 600, at page 611.

In the *McDermott* case the Supreme Court cites with approval our quotation from the *Kenon* case, *supra*.

The court on the trial of the Collins case conformed its main charge to the rules of damage which we have quoted, saying:

“In arriving at the amount you will award him you may take into consideration all the pain of body and mind he has suffered as a direct result of the injuries he received and of which he complains in his complaint from the time of the accident to the present time
 * * * all the pain and suffering, if any, he will endure in the future which directly grows out of his complained of injuries * * *.”

Recognition of the fullness of the charge in this respect was given by plaintiff's counsel when he requested the charge that he was entitled to recover for shame and humiliation “in addition to the pain and suffering.”

Here was a complete differentiation of the element of pain and suffering due directly to the injury which the court charged was a proper element of damage, from the element of shame and humiliation attributable to the disfigurement.

The shame and humiliation came from the real or imagined interest in the plaintiff's condition of the curious and morbid. These were the extraneous considerations and extraneous causes which fall within the rules of exclusion as elements of damage laid down by the court.

A person may be as sensitive about the loss of an arm or of a leg as about scarred tissue on the face, yet in all of the cases in which injuries of this character have existed the writer has never known of a jury being authorized to award damages because of the shame or humiliation which the maimed person feels or imagines he feels from the gaze of the curious.

Of erroneous charge the Circuit Court of Appeals said:

“The instruction as asked was entirely unnecessary and the words in which it was framed were not well chosen and we think the court might well have declined to give it on the ground that the subject had been substantially covered inasmuch as he had already instructed that the jury could consider ‘all the pain of body and mind he has suffered as a direct result of the injuries he received * * * from the time of the accident to the present time * * * all the pain and suffering he will endure in the future which directly grows out of his complained of injuries’.” (Page 244).

The court will note that after, as the Circuit Court of Appeals said, the jury had been fully instructed with reference to the elements of damage, the court made the further charge that compensation could be granted for shame and humiliation “in addition to the pain and suffering.” (Fol. 801, page 201).

If shame and humiliation are elements of damage no better selection of words could have been employed to instruct the jury. The ill chosen words related to claimed elements of damages not resulting *directly* from the injuries but to causes wholly unrelated and arising long after the injury.

POINT III.

The judgment in favor of Collins should be reversed and as no other ground of jurisdiction than employment in interstate commerce is alleged in the complaint the District Court should be directed to dismiss the complaint.

MOOT, SPRAGUE, BROWNELL & MARCY,

Attorneys for Plaintiff-in-Error.

ADELBERT MOOT,
JOHN W. RYAN,
Of Counsel.

FILED

JAN 5 1920

JAMES D. MAHER;
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 348.

ERIE RAILROAD COMPANY,	}
<i>Plaintiff in Error,</i>	
against	
WILLIAM M. COLLINS,	
<i>Defendant in Error.</i>	

BRIEF FOR DEFENDANT IN ERROR.

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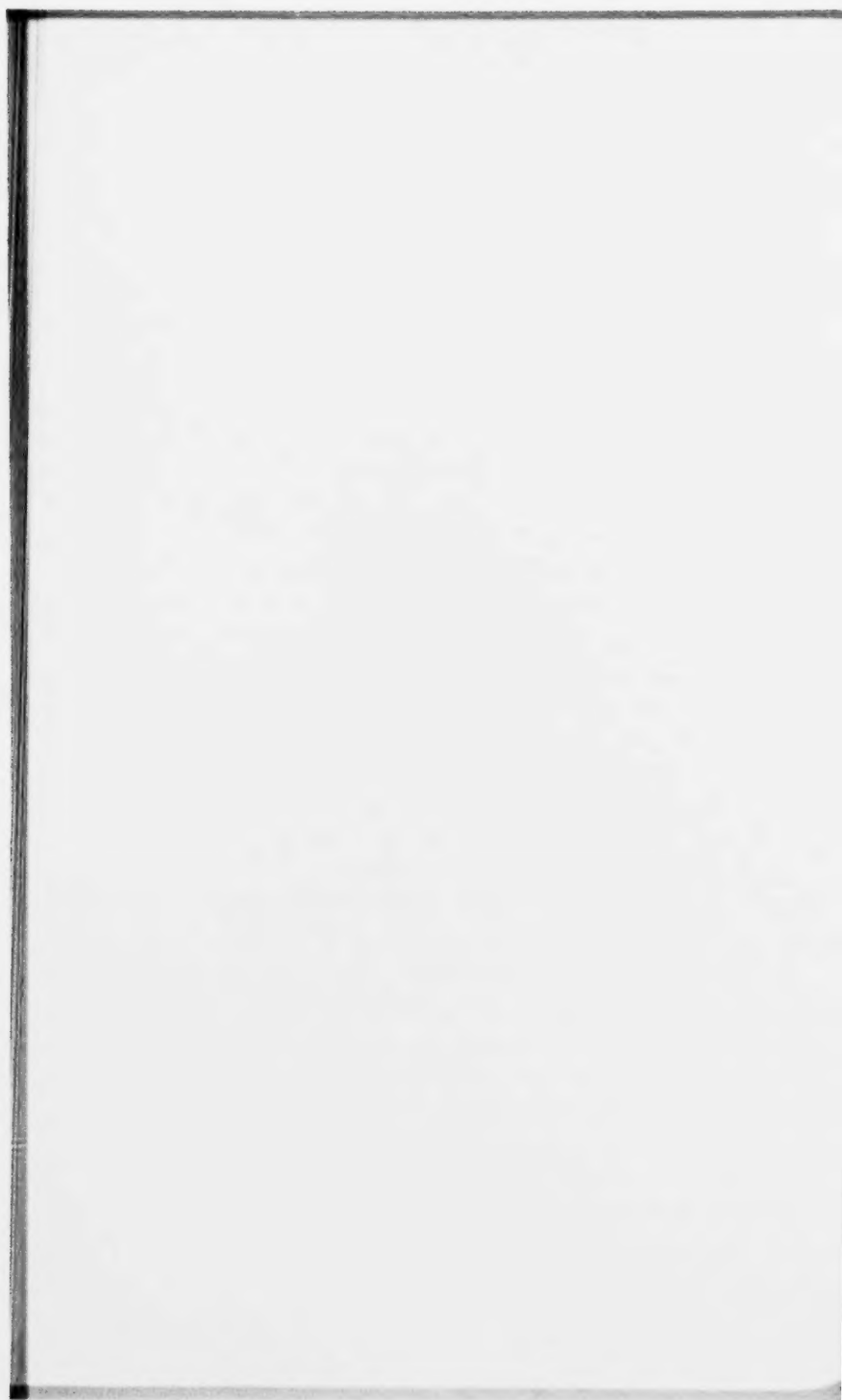
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Supreme Court of the United States

October Term, 1919.

ERIE RAILROAD COMPANY, <i>Plaintiff in Error,</i> against WILLIAM M. COLLINS, <i>Defendant in Error.</i>	}
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BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

Plaintiff in error demands reversal of this judgment on two grounds:

1st: That defendant in error was not at the time of the accident and consequent injuries to him engaged in interstate commerce, or performing an act of his employment so related thereto or connected therewith or incidental thereto as to be a part of the interstate commerce in which plaintiff in error, the employer, was concededly engaged.

2nd: That the Trial Court erred in charging that among the elements of damages for the con-

sideration of the jury were the disfigurement of the injured person and his physical impairment, and the mental pain or humiliation resulting therefrom.

POINT I.

At the time of the injury defendant in error was engaged in interstate employment, or in an act of his employment so closely related to or connected with or incidental to interstate commerce as to come within the Federal Act.

It was conceded by plaintiff in error at the trial, and is now, that at the time of the accident it was an interstate commerce railroad common carrier, and at the precise moment of the accident engaged in interstate commerce (Fols. 619, 620).

It is undisputed that the defendant in error was at the time of the accident in the employ of the plaintiff in error, in charge of a signal tower and switches, and also a pumping station and gasoline engine used for pumping water into a water tank, all of which were in use in connection with and as a part of the interstate commerce in which plaintiff in error was engaged, and that when the accident happened defendant in error was acting in the discharge of one of the duties of such employment, viz, operating said gasoline engine to replenish the water tank from which interstate engines of plaintiff in error were at the time taking water.

The map, Defendant's Exhibit 10, and the photo, Plaintiff's Exhibit 1, show the exterior physical situation. The tower is located, according to the descriptive terms of the railroad company, on the south side of several of its main tracks used for traffic from New York City through the State of New York and to the west into other states. The tower is used for the purposes of watching and signaling with reference to trains, both interstate and intrastate, passing both ways. About thirty trains passed regularly each day. Defendant in error's regular place of employment was in the upper story of the tower enclosed mostly by glass in which were telegraph and telephone instruments which it was part of his duties to use. About forty feet to the east of the tower on the same side of the tracks the pump house was located. This is a structure twenty-five feet long and about fifteen feet wide in which was a gasoline engine. The map shows the plan of this pump house and the rear and side elevations and floor plan, and defendant in error's Exhibit 2, and plaintiff in error's Exhibits 2, 3 and 4, are pictures showing this engine and the interior of the pump house. The engine was used to operate the pump which pumped water from a well situate about eight or ten feet west of the west end of the pump house into the water tank situate a short distance away for the purpose of supplying these passing interstate engines with water.

Collins was employed as night man in charge and operation of the tower, gasoline engine, etc. (Fols. 139-142).

He was charged with a multiplicity of duties when put in charge of this interstate plant on December 21, 1915. He was by occupation a telegraph operator. He was required, however, not only to operate the telegraph instruments in the signal tower, but also the telephones therein, also the switches and this gasoline engine outside, and keep the water tank supplied with water, by operating the gasoline engine and pump; was, as he termed it, signal man, level man, and incidently ran the gasoline engine and pump (Fol. 105). A great many of these passing trains took the sidings which were there and it was also necessary for him to go up and down the track when a train wanted to take one of these sidings and line the switches for that purpose (Fol. 140). He described his duties there as follows:

“Reported trains as they went back and forth by the tower to the despatcher in Buffalo. In case a train wanted to go on the siding the despatcher would notify you to put the train on the siding and it was necessary to walk down the track four or five rods and throw the switch and walk up the track about the same distance to put these trains in there, the same way going east and west.” (Fols. 139-142).

He had sole charge of this tower at night (Fol. 142). Had telegraph instruments there but reported trains by telephone usually, (Fols. 143, 144). Was required to operate the pump and gasoline engine whenever necessary to fill the water tank to keep the passing engines supplied with water (Fols. 107, 181-186). It was his duty to keep an adequate supply of water in the tank (Fol. 253).

At Hunts about ten or eleven miles west of this tower the lines branch off to Jamestown and west into the State of Ohio (Fols. 145, 146). Trains and cars to and from New York, Cleveland and Chicago all in different states thus pass the tower (Fols. 146, 147). About twenty-five or thirty freight trains a day pass the tower each way (Fols. 147, 148). In addition to that there were a number of passenger trains operating over the same tracks (Fol. 149). Twenty-five engines a day took water there (Fol. 150). The water tank held about two hundred fifty barrels (Fols. 151, 152). An engine would usually take about two and one-half feet of water out of the tank (Fols. 152, 153). The tank was sixteen feet high (Fol. 153), so seven or eight engines would exhaust the water in the tank (Fol. 153). Defendant in error had no advance information when engines intended to stop for water (Fol. 154). He kept a record of the engines that took water on his train sheet (Fol. 154). No permission was required to take water (Fol. 155). These

twenty-five engines so taking water were drawing freight trains by the place (Fol. 156). There was a gauge on the tank showing the amount of water in it (Fols. 156, 157). This tower house and the gasoline engine and tank had been there in operation for sixteen or seventeen years. (Fols. 158, 159, 160, 161).

Defendant in error was required to report every train that went by whether he was asked by the train despatcher to do so or not, even though they did not stop (Fol. 250) and also keep a record of them in the book (Fols. 251, 178, 179).

Another employee of plaintiff in error, William F. Jeffries, testified that he was the day man in charge of this tower at the time of the accident. Had been there fifteen years. The tower had been there during that time, and the gasoline engine about twelve years. That he was supposed to be the manager and keep track and see that things went properly (Fols. 532, 536). He used the pump every day when it was necessary and had used it at night (Fols. 538, 539).

Defendant in error handled the apparatus there which stopped the trains and indicated the position of the switches, in electric block signals, so that he was appraised of the condition of the traffic on either side of them (Fols. 180, 181). These duties occupied his time and attention from the day he went there as night man to take charge on

December 21st to the time of the accident on December 25, 1915 (Fol. 181). Whenever it was necessary he was required to leave the tower and go to the pump house, set the gasoline engine in operation and operate the engine and pump for the purpose of refilling the water tank (Fols. 107, 181-186-253).

On the night of said December 25, there was a wreck on the road at Hunts ten or eleven miles to the west and as a consequence there were interstate trains on the siding at the tower, it being impossible to get by the derailment, and interstate engines were standing around there to water. (Fol. 181). They were drawing freight trains going to the west, that is, out of the state (Fol. 183). Defendant in error could not see the gauge at night on the tank and there was no way he could judge whether the water tank needed to be refilled by the pumping process except by the number of engines which stopped there to take water (Fols. 184, 185). That night there was such an extraordinary number of engines there taking water. Collins went over to pump some water into the tank about 3:15 a. m., taking a regular railroad lantern with him (Fols. 185, 186).

While, therefore, he was in the very act of doing this, interstate engines were taking the water from the tank, and it was while so engaged that the explosion and injuries occurred.

The character of the act which defendant in error was performing at the time presents two phases for consideration from either of which, we think, it must be said that he was at the time employed in interstate commerce.

The first of these arises from his general employment in charge and operation of permanent stationary instrumentalities in general and indiscriminate use in both intra and interstate commerce, consisting of the tower, the telephone and telegraph apparatus therein, the switches, pump house, gasoline engine and water tank. At the time of the accident he was in the discharge of one of his duties in such employment, viz, operating the gasoline engine for the purpose of pumping water into the water tank, with which interstate engines were at the time being replenished. These were all permanent and stationary instrumentalities of interstate commerce.

The second phase arises from the fact that he was at the precise moment pumping water into the tank for immediate use of interstate engines, which water was at the time being taken by said engines, and this water being detached and transitory, the question insofar as it is concerned, turns on whether it had the interstate quality at the precise time—whether it was then being moved in connection with or relation to or as a part of interstate commerce, closely connected therewith or related or incidental thereto as to be a part of

the interstate commerce in which plaintiff in error was engaged.

This latter phase is to be considered independently of the other or the nature of Collins' general employment in operation of permanent instrumentalities of interstate commerce, including the engine, pump, etc.

Some cases present only one of these phases. This case presents both.

The first always brings the employee within the Federal Act. The second brings him within the Federal Act when the transitory or moveable thing, like the water in this case, has for the time being the interstate quality, i. e., when it is being moved, or in preparation for movement, in interstate commerce. The interstate quality lasts only while and so long as the interstate function continues, and the act of the employee is in interstate commerce under the same limitations. Only in the consideration of this branch of the question does the interstate quality of the thing being moved, and the consequent interstate quality of the act of moving it, become pertinent. If the water Collins was about to pump into the tank, and thus practically into waiting interstate engines was being moved in interstate commerce, or in such close connection or relation therewith as to be a part of it, then Collins was engaged in interstate commerce regardless of what his general

employment was, and regardless of whether the engine and pump were permanent instrumentalities of interstate commerce. On the other hand, as his general employment was interstate, consisting of the charge and operation of various permanent and stationary instrumentalities of interstate commerce, viz, the signal tower and signals, pumping station, gasoline engine and water tank, and the act he was actually performing at the time was one of his duties in such employment, it must be said that he was engaged in interstate commerce.

The authorities cited and quotations from opinions made by counsel for plaintiff in error to the effect that the test as to whether the act of the employee is in interstate commerce is the character of the work he is doing at the precise time are correct—in fact, simply announce an elemental principle applicable to all cases. But the cases in which this principle has been announced, and from which said quotations are taken, more properly concern the second phase above pointed out, i. e., the simple question as to whether the thing being moved by the employee at the time had the necessary interstate quality. The rule that the employee is within the Federal Act, has universal application where the employment is in charge of and in operation of permanent instrumentalities of interstate commerce, and the act the employee was doing at the time was a part of such employment.

If the question here is to be narrowed down to the consideration as to whether the water Collins was about to pump into the tank for immediate use by interstate engines had the interstate quality, or the act of moving it was a part of, or so closely related to interstate commerce as to be a part of it, independent of what the general employment of Collins was, and independent of the question of whether the instrumentalities he was operating were permanent and stationary instrumentalities of interstate commerce, then the act that he was performing and the interstate character of it at the precise time become acute. But, on the other phase of the case, it does not become acute, for it makes no difference what the precise quality of the water was, or the act of moving it, as to their being interstate, as long as Collins was engaged in performing a duty of his regular interstate employment and was operating an interstate instrumentality.

There is no controversy over the general principles as to tests laid down by the courts. The questions here are, first as to whether the test is not fully met by the general character of Collins' employment in this case and the fact that he was at the time operating a permanent instrumentality of interstate commerce, and, if that be not so, then, second, whether the act he was performing, standing by itself, was a part of the interstate commerce in which plaintiff in error was engaged, or so closely related to or connected with it as to be a part of it.

On the latter, questions of the interstate quality of the moveable thing upon or with relation to which the work is being done, and of directness and remoteness arise. Not so on the former.

In the *Mondou* case (223 U. S. 1), this court said an act was interstate if it had

"a real or substantial connection with the interstate commerce in which the carriers and other employees are engaged."

In the *Welsh* case (243 U. S., 303; 37 Sup. Ct. 116) the test applied was

"whether he was performing an act so directly and immediately connected with his previous act of placing the interstate cars in the F. B. yard as to be a part of it or a necessary incident thereto."

In the *Carr* case (238 U. S., 260), it was said:

"Each case must be decided in the light of the particular facts with a view of determining whether, at the time of the injury, the employee is engaged in interstate business or in an act which is so directly and immediately connected with such business as substantially to form a part or necessary incident thereto."

And in the *Shanks* case (239 U. S., 556; 36 Sup. Ct. Rep., 188), this court said:

“Was the employee at the time of the injury engaged in an interstate transaction *or in work so closely related to it as to be practically a part of it?*”

In

Kinzell v. Chicago, etc. R. Co., 39 Sup. Ct. Rep. 412, the court said:

“Was the work being done independently of the interstate commerce in which the company was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned or was it in the nature of a duty resting upon the carrier?”

The two phases of the employment above pointed out lead to consideration of the distinction running through all the cases between employment on permanent and stationary instrumentalities of commerce and employment upon or relating to moveable, transitory and detached instrumentalities or commodities.

This distinction was pointed out in the *Winters* case (242 U. S., 253; 37 S. C. R. 170), where the employee was engaged as a machinist's helper making repairs to an engine. The court said:

“This is not like the matter of repairs upon a road permanently devoted to commerce among the states. An engine as such is not

permanently devoted to any kind of traffic and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for."

And also in the case of

Eng. v. Southern Pac. Co., 210 Fed., 92, where the employee was engaged in framing a new office in a freight shed used for both kinds of commerce, the court saying:

"The principle seems to be that one employed at the time of his injuries *in the use of or maintaining in proper condition any instrumentality or appliance used by the carrier in interstate commerce comes within the statute although such instrumentality or appliance may also be used for intrastate business*. Now freight sheds, depots and warehouses or *other facilities* provided and used by a carrier for receiving and handling and discharging interstate freight are, I take it, instrumentalities used in interstate commerce under the doctrine of the cases and are so closely connected therewith as to be a part thereof for the purpose of the Federal Employers' Liability Act."

In

Southern Railway Co. vs. Puckett, 244 U. S. 571; 37 Sup. Ct. Rep., 703;

the employee was carrying blocks on his shoulder

to be used in jacking up a wrecked car on a track used for both kinds of commerce. While so carrying said blocks to the scene of the wreck he stumbled over some large clinkers and was injured. It was held that he was engaged in interstate commerce although his primary object was to rescue a fellow employee pinned beneath the car to be jacked up. The court said that notwithstanding the fact that his primary object was to rescue his fellow employee:

"his act, nevertheless, was the first step in clearing obstructions from the tracks to the end that the remaining cars for train No. 75 might be hauled over them and this work facilitated interstate transportation on the railroad, and that, consequently, he was engaged in interstate commerce when injured * * * * * from the facts found it is plain that the object of clearing the track entered inseparably into the purpose of jacking up the car and gave to the operation the character of interstate commerce."

"The case is controlled by *Pedersen v. D. L. & W. R. Co.* (229 U. S., 146; 33 Sup. Ct. Rep., 640); *N. Y. C. & H. R. R. Co. v. Carr*, (238 U. S., 260, 263; 35 Sup. Ct. Rep., 780); *Penn. R. Co. v. Donat* (239 U. S., 50; 36 Sup. Ct. Rep., 4); *Louisville & N. R. Co., v. Parker*, (242 U. S., 13; 37 Sup. Ct. Rep., 4)."

An employee engaged in operating a pumping station which furnished water for use indiscrim-

inately and contemporaneously to interstate and intrastate engines was engaged in interstate commerce within the meaning of the Federal Act. (*Roush v. Baltimore & Ohio R. Co.*, 243 Fed., 710). This is our case.

In

Thomas v. Boston N. R. R. Co., 219 Fed., 180;

a carpenter was engaged in tearing down a roundhouse used for both interstate and intrastate commerce. It was held that the roundhouse being a permanent instrumentality of both kinds of commerce, plaintiff was employed in interstate commerce.

In

Pittsburg C. C. & St. L. Ry. Co. vs. Glynn, 219 Fed., 148;

plaintiff's intestate, a switchman, was struck and killed at night by the operation of a freight train running backwards at high speed while he was engaged in lining switches for his switch engine, the court said;

"At the moment the switch engine was not hauling any cars and *so the true character of the employment can be determined only by a broader view.* The evidence showed that the railroad company in and about these yards was continuously and indiscriminately hauling interstate and intrastate freight and that in this part of the work no distinction whatever was made between the two classes."

After reviewing the Pedersen (229 U. S., 166), Seale (220 U. S., 156), Zacharie (232 U. S., 248), Law (208 Fed., 869), Behrens (233 U. S., 473), and other cases, the court held that because the decedent employee was engaged generally in the operation of a switch engine, which, however, was not at the time specially engaged in an interstate function but only generally so, that said employee was within the act although the train which backed upon him and killed him was not an interstate train.

In

Coal & Coke R. Co. vs. Deal, 231 Fed., 604;

a railroad employee was engaged in repairing telegraph and telephone lines which the railroad maintained as part of its equipment along its tracks for the purpose of transmitting orders for the movement of trains engaged in interstate commerce. The court held that he came within the act, saying:

"It is a matter of common knowledge that in order to successfully operate a railroad it is essential that the carrier should have a well-equipped telegraph and telephone line constructed and maintained near to and parallel with its tracks so as to enable its train despatchers to transmit their orders and thereby keep the engineers and firemen properly advised as the relative positions of the respective trains. Under these circum-

stances a telephone or telegraph line is just as essential to the practical operation of the road as the tracks or any other particular part of the road's equipment."

This language applies not only to the telegraph and telephone lines and the tower which Collins was employed upon, and to the pump house and engine and tank he was engaged upon at the precise time of the accident, but also to the water which he was pumping into the tank for immediate use of interstate engines.

In

Philadelphia, etc. R. Co. v. McConnell,
228 Fed., 263;

an employee was engaged as one of a crew in transporting or carrying away rails taken out of an interstate and intrastate track for the purpose of putting new ones in, which had been done. He was held within the act when injured while so engaged.

An employee was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act when injured while working about and upon an open coal dock engaged in supplying coal sent to engines moving in interstate commerce although some of them laid up over night at the dock and resumed their journey early the next morning. (Guy v. Cincinnati & Northern R. Co., 166 N. W., 667, certiorari denied 246 U. S., 418).

An engineer who was injured while repairing a hoist used to fill coal boxes from which locomotives engaged in both kinds of commerce were coaled was within the Act. (*Sells v. Grand Trunk & Western R. Co.*, 206 Ill. App., 45, certiorari denied by Supreme Court).

In

Philadelphia, etc. R. Co. v. Smith, 39 Sup. Ct. Rep. 396,

the employee was employed by the Railroad Company in connection with a gang of bridge carpenters, employed by defendant in repairing bridges and bridge abutments upon its line of railway. A car was supplied and moved about wherever the work was being done for the workmen to sleep and eat in. The employee's duties were to care for this car and prepare and cook the meals for himself and the other employees, and while doing that he was injured. This court, Justice Pitney writing, referred to the test here invoked by our opponents, i. e.,

“that the true test is the nature of the work being done by the employee at the time of the injury, and that what he had been doing before and expected to do afterwards is of no consequence.”

And the court also referred to the argument of plaintiff in error in that case, based upon such test, that as

"plaintiff at the moment of the injury was engaged in cooking food which was the property of himself and the carpenters, he was not at the time engaged in interstate commerce."

Then this court further said:

"As thus stated, the relation of plaintiff's work to the interstate commerce of his employer would seem to be rather remote, but upon a closer examination of the facts, the contrary will appear. Taking it to be settled by the decision of this court in *Pedersen v. Dela. Lack. & West. R. R. Co.*, (229 U. S. 146-152; 33 Sup. Ct. 648; 57 L. ed. 1125, Ann. Cas. 1914; C. 153), that the repair of bridges in use as instrumentalities of interstate commerce is so closely related to such commerce as to be in practice, and in legal contemplation, a part of it, it, of course, is evident that the work of the bridge carpenters in the present case was so closely related to defendant's interstate commerce as to be in effect a part of it. The next question is, what was plaintiff's relation to the work of the bridge carpenters? It may be freely conceded that if he had been acting as cook and camp cleaner, or attendant merely for the personal convenience of the bridge carpenters, and without regard to the conduct of their work, he could not properly have been deemed to be in any sense a participant in their work. But the fact was otherwise. He was employed in a camp car

which belonged to the railroad company and was moved about from place to place along its line according to the exigencies of the work of the bridge carpenters, no doubt, with the object, and certainly with the necessary effect of forwarding their work by permitting them to conduct it conveniently at points remote from their homes and remote from towns where proper board and lodging were to be had. * * * The significant thing, in our opinion, is that he was employed by the defendant to assist, and actually was assisting the work of the bridge carpenters by keeping their bed and board close to their place of work, thus rendering it easier for defendant to maintain a proper organization of the bridge gang and forwarding their work by reducing the time lost in going to and from their meals and their lodging places. If, instead, he had brought their meals to them daily at the bridge upon which they happened to be working, it hardly would be questioned that his work in so doing was a part of theirs. What he was in fact doing was the same in kind and did not differ materially in degree. Hence, he was employed as they were in interstate commerce within the meaning of the Employer's Liability Act."

The above case is applicable here on both questions involved. It follows the doctrine that an employee engaged upon a permanent instrumentality

of interstate commerce is employed in interstate commerce, and also that if he is assisting others engaged in interstate commerce, he himself is so employed.

Collins was not only employed upon the engine, a permanent instrumentality of interstate commerce, but was actually assisting engineers who were engaged in interstate employment at the time, in replenishing their engines with water at the moment which, of course, was necessary to the operation of the engines in interstate commerce. Such engines were present taking water at the very time. Here is a direct and immediate connection of the act of Collins with interstate commerce which distinguishes this case from such cases as the *Fourkannis* case (238 U. S., 439); *Harrington* case (241 U. S., 179); *Barlow* case, 244 U. S., 183; *Schanks* case (239 U. S., 556); *Kelly* case (238 Fed., 95); *Winters* case (242 U. S., 358), and other cases cited by our opponents.

The argument of our opponents that if Collins had been carrying the water to the tank he would not be within the statute falls before the language of the court above quoted.

In *Kinzel v. Chicago, etc. R. Co.*, 38 Sup. Ct. Rep. 412, an employee, with others, was engaged in filling a cut on the railway company's line with dirt where a bridge had been, a line used in interstate commerce.

His particular employment was the operation of a "dozer" used for keeping the tracks clear of dirt. This court, among other things, said:

"It, (the dozer) was used for the double purpose of keeping the rails clear for the interstate commerce passing over them, and for pushing material to the edge of the embankment to widen it. When to this is added that part of Kinzell's duty was with a shovel to keep the track between the rails clear of earth and stones which might fall upon it in the progress of the work, clearly, it cannot be soundly said that when he was in the act of preparing to make the required use of the "dozer" he was acting independently of the interstate commerce in which the railway company was engaged, or that the performance of his duties was a matter of indifference to the conduct of that commerce. He was employed in keeping the interstate track, which was in daily use, clear and safe for interstate trains, or, as the Superintendent of the railway company stated it, he was engaged with the "dozer" and shovel in making the track safe for the operation of trains and in avoiding delay to the commerce passing over it."

In

Guida v. Pa. R. Co., 183 A. D. 822; (affirmed, 224 N. Y., 712).

an employee was badly injured while cleaning soot from a boiler in the power plant of a railroad

company generating electricity for the operation of trains on one road wholly in New York State and on another partly in New York and partly in New Jersey. Held that he was within the act.

In

Hargrove v. Gulf, Colorado & Santa Fe
R. Co., 202 S. W. 188;

it was held that an employee engaged in loading on flat cars old rails which had just been removed from an interstate railway line and replaced with new ones was engaged in interstate commerce.

In

Eskelsen v. Union Pac. R. Co., 167 N. W.
408;

it was held that an employee employed at a trans-continental station handling interstate and intrastate baggage is within the act.

In

Denver & Rio Grande R. Co. v. Vekam,
165 Pac., 254;

it was held that a section hand was within the protection of the Federal Employers' Liability Act where he was killed while inspecting an interstate railway track and gathering up old rails from the side thereof.

Likewise it has been held that an employee engaged as one of a wrecking crew employed by an interstate carrier was within the act while engag-

ed in removing a wreck of an interstate freight train and opening up the track used to carry both interstate and intrastate traffic. (*Denver & Rio Grande R. Co. vs. Wilson*, 163 Pac., 57).

An employee even only on his way to report for duty to go to such a wreck was held to be within the act. In *re Maroney* (188 N. E., 134).

Or while cleaning snow from an interstate track (*Morata v. Oregon, Washington R. & N. Co.*, (170 Pac., 291).

From these cases it is clear, we think, that Collins at the time of his injury was in general employment in interstate commerce in that he had charge of and operated stationary and permanent instrumentalities of interstate commerce, viz: the tower, the telephone and telegraph lines, the switches, the gasoline engine and pump house and the tank, all of which were without question a part of the interstate commerce being carried on by the railroad company and necessary, certainly incidental, thereto. At the very moment of the accident he was operating one of these instrumentalities. He was as much an interstate employee as a section hand engaged upon the roadbed or tracks used for both kinds of commerce.

One engaged upon a track used for both kinds of commerce might be shoveling a landslide from the track, or removing rocks, which would have no in-

terstate quality in themselves, yet it is clearly established that he would come within the act. In the Pedersen case the bolts the employee was carrying had no interstate quality in themselves, but the court took a broader view and held that the employee was engaged generally upon a permanent instrumentality of both interstate and intrastate commerce, viz: the bridge and track, and therefore, he was within the act. In the Puckett case, *supra*, the blocks that the employee was carrying or the clinker he stumbled over had no interstate quality in themselves, but again the broader view was taken that the employee was engaged generally upon a permanent instrumentality of both kinds of commerce, viz: the track or roadbed, and, while the clearing of the same was not his primary object, still it was a necessary result of his work, therefore, he was within the act.

In the *Smith* case (39 Sup. Ct. Rep. 396), the food the employee was supplying and cooking had no interstate quality in itself, nor was the act he was doing itself interstate, except that it was in aid of other employees actually engaged in interstate employment, repairing a permanent instrumentality of interstate commerce.

Can Collins be said to have been doing less?

In the *Kinzell* case (39 Sup. Ct. Rep., 412), the "dozer" the employee was operating, and the dirt and rocks he was clearing the track of, had no in-

terstate quality in themselves, but the work he was doing was a necessary incident of interstate commerce, i. e., it related to and was connected with interstate commerce in that it kept the tracks clear so that interstate commerce could go on.

Was not Collin's work a necessary incident of interstate commerce, and so closely and directly related to and connected with it as to be a necessary part of it? He was operating a pump to supply interstate engines with water, without which they could not engage or be used in interstate commerce, and the pump itself was a permanent and stationary institution, necessary, and certainly closely related to interstate commerce, for it was necessary to the use above mentioned.

It was necessary that Collin's duties with reference to signaling, telegraphing, and telephoning should be done in order to properly carry on interstate commerce. It was also necessary that a water tank should be there and that it should be kept supplied with water for the interstate engines that passed, and also that there should be a pump house and a pump and a gasoline engine for the purpose of keeping the water tank supplied with water, and that should be operated in order that interstate engines could continue their interstate functions. Certainly all these things were necessary parts of and incidents to the interstate commerce carried on by the railroad company, and, that being so, the man who had charge of them and who was operating them and was en-

gaged in such employment at the precise moment in operating the gasoline engine to fill the tank with water supplying the interstate engines, was engaged in interstate commerce.

There is no force in the contention that what Collins was doing at the precise time, viz: operating the gasoline engine to pump water into the tank was a separate and distinct duty. It was one of the duties of his general interstate employment, and being the operation of a stationary fixed interstate instrumentality, was interstate in itself. Injury to such an employee in itself has the effect to hinder, delay, or interfere with such commerce. (*Lamphere case*, 196 Fed. 336).

The distinction sought to be drawn by our opponents between work *in* and work *for* interstate commerce has no support either in principle or authority.

The numerous pronouncements by this and other courts that when an employee is performing work which is a "necessary incident of" or "closely related to" or "connected with" interstate commerce, he comes within the Act, mean that in such cases the employee is working *for* and not *in* interstate, and yet he comes within the Act.

Pedersen (229 U. S., 146), carrying the bolts to a bridge to repair it; *Puckett* (244 U. S., 571), carrying a jack to a car on an interstate track to

jack it up with; Smith (39 Sup. Ct. Rep. 396), cooking food for workers engaged in repairing a track; Kinzell (39 Sup. Ct. Rep. 412), operating a "dozer" to keep the track clear of stones and dirt; Eng (210 Fed. 92), engaged in framing a new office in an interstate freight house; Thomas (219 Fed. 180), engaged in tearing down an interstate round house; Glynn (219 Fed., 148), engaged in operating a switch engine, the general use of which was with reference to interstate cars, but not at the time so engaged; Deal (231 Fed., 604), engaged in repairing railroad telegraph and telephone lines; McConnell (228 Fed., 263), engaged in carrying away discarded rails taken from an interstate track for the purpose of putting in new ones; Guida (224 N. Y., 712; 183 N. Y. A. D., 822), cleaning soot from a boiler in the power plant of an interstate railroad; Hargrove (202 S. W., 188), loading flat cars with old rails which had been removed from an interstate track; Horton (72 Wash. 503), engaged in his work as engineer pumping water to be used in both intrastate and interstate commerce; Roush (243 Fed., 712), engaged in the same work Collins, in the case at bar, was engaged in, viz, operating a gasoline engine to pump water into tanks for the use of intrastate and interstate engines; Lindstrom (186 N. Y. A. D., 429), engaged in cleaning engines at the dump pit, used, when in use, in interstate commerce; Porter (39 Sup. Ct. Rep. 188), shoveling snow on the right of way between a platform and tracks used in intrastate and interstate commerce;

Kelly (188 N. Y. A. D., 863), engaged in oiling machinery for operating a gasoline engine to supply water for various purposes, including interstate engines; were all working *for*, and not *in*, interstate commerce, and yet were all held to be within the Federal Act.

As before stated, this case should not be determined solely on the question as to whether the water Collins was about to pump into the tank possessed an interstate quality or whether the act of moving it was interstate, and yet, thus far in this case it seems to have been determined on that basis alone, and we say that that is correct, although this does not matter if we are right as to the other phase of the case.

The character of the thing,—that is, water—upon which the employee was engaged is material to consider here. In the Barlow, Harrington, and Yurkonis cases the thing being handled was coal. That is a tangible article, concrete in its separability. Unless the employee were actually putting coal into an engine which was interstate it cannot be said that the future use of the coal is shown with imminence and certainty; that is whether it is being or will ever be used in interstate commerce, and even if such future use appear, still it may be too remote. No one could say with certainty that the coal a miner is mining at the mine, for instance, would ever be used in interstate commerce. In the first place it is tangible and separ-

rable and might all be used in one or the other kind of commerce. And secondly, owing to remoteness it might not be used in either. One handling coal at the chutes for use of the railroad company not loading it upon an interstate engine at the precise time, cannot be said to be shown with certainty to be engaged in interstate commerce because, also, the future use of the coal is indefinite, remote and uncertain and all of it that he might be handling at the time of the injury might be used for one or the other kind of commerce or not in either.

Water is intangible and inseparable. It has a oneness which does not permit of the distinction drawn with reference to coal. Such distinction fades away with its intangibility and inconcrete inseparability. While engines engaged in both kinds of commerce constantly took water from the tank it cannot be said that some of them might take the precise water that the employee was pumping at the time and others not. The use of the water for interstate commerce, therefore, appears with certainty. The distinction drawn in the case of tangible and concretely separable articles of freightage or handling cannot be applied to water.

Furthermore in all the cases treating of the movement and handling of coal the coal was being handled either at the mine or in, or being taken to, the chutes. There was no showing that it

was in process of being loaded into engines for the purpose of use there. Here the case is different. The water was in process of being put into the engines. The tank was merely an instrument constituting part of the course of the water from the pump to the engines. The interstate engines were there not only at the precise time, but regularly going to the tank in the course of movements in interstate commerce then going on to take water. It was the same as if Collins were pumping the water into an interstate engine. He was pumping it into a tank from which interstate engines took it and in fact were taking it at the time, several engines being present and taking water. No remoteness here and interstate use was present, immediate and direct.

The following cases are precisely in point on this branch of the case:

Roush vs. Baltimore & Ohio, 243 Fed., 712.

Horton v. Oregon W. R. & N. Co., 72 Wash., 503.

Kelly v. Erie R. Co., 188 A. D., 863.

In the *Roush* case, above, the employee was engaged in operating a pumping station, which furnished water for use indiscriminately and contemporaneously to engines engaged both in intrastate and interstate commerce. He was held to be within the Act.

In the *Horton* case, above, the employee, an engineer, was engaged in pumping water for use in both intrastate and interstate commerce. He was held to be within the Act.

In the *Kelly* case, above, the employee was oiling machinery by which water was pumped for supplying water to locomotives engaged in both kinds of commerce. He was held to be within the Act.

None of the cases cited by plaintiff in error hold to the contrary.

In the

Winters case (242 U. S., 253);

the employee was engaged as a machinist's helper making repairs upon an engine. The contention that he was employed in interstate commerce was based entirely on the alleged interstate quality of the engine at the precise time. That is that it was then actually functioning in interstate commerce. It appeared, however, that the engine was not being used in interstate commerce at the time nor that it was definitely ordered to be so used and no such definite purpose was shown. Its next function might be either intrastate or interstate. As the court in that case pointed out it was "*not like the matter of repairs upon a road permanently devoted to commerce among the States*".

In the

Shanks case (239 U. S., 556; 36 Sup. Ct. Rep., 188);

cited by counsel, the employee was working in a machine shop repairing parts of locomotives. There was no contention that his general employment was interstate, and it was simply held that the mere fact that he was repairing parts of locomotives did not make his employment interstate where there was no special interstate quality shown in the parts he was at the moment employed upon, even although he might sometimes be employed on the parts of an interstate engine.

The Barlow case (244 U. S., 183; 37 Sup. Ct. Rep., 515), the Harrington case (241 U. S., 177) and the Yurkonis case (238 U. S., 439) cited by counsel all had to do with the handling of coal. There was no contention in any of them *that the general employment of the employee was interstate.*

In the Yurkonis case the coal the employee was working on, was simply being mined. It was said that the

“mere fact that the coal might be used or was intended to be used in the conduct of interstate commerce or the fact the same was mined for transport did not make the injury received by the plaintiff one received while he was engaged in interstate commerce.”

Of course, the miners had no interstate employment like Collins in the case at bar, generally speaking. They were simply miners of coal. The contention that the employment was interstate had to be based entirely upon the interstate quality of the coal at the time and it had none, neither had the mines nor the miners. Neither was there any certain or immediate use of the coal in interstate commerce in view. It might be so used and it might not.

In the Barlow case the employee was engaged as a member of a switching crew assisting in placing on an unloading trestle in the yards coal cars belonging to the company loaded with supply coal for it which, while they had come from without the state, had remained in the yards upon sidings for several days before removal to the trestle. It was sought to make the employment interstate because the coal had been brought from without the state. It was held that this interstate function had ended several days before, the court saying:

“We think their interstate movement terminated before the cars left the sidings and that while removing them the switching crew was not employed in interstate commerce.”

In that case also there was no contention that the employee was by his general employment engaged in interstate commerce.

In the Harrington case (241 U. S., 177), plaintiff's intestate was killed while removing coal from storage tracks to the coal shed or chutes. The coal was for use by the railroad company itself. It had been brought to the storage tracks sometime before. The court said with reference to that movement:

"With the movement of the coal to the storage tracks, however, we are not concerned. That movement had long since ended."

The question turned entirely upon the use the coal was afterwards to be put to. It was to be placed in the bins or chutes to be taken as needed by locomotives of all classes engaged in both interstate and intrastate traffic. Nobody could tell at what future time the coal would be used, if at all, nor could it be told with any degree of certainty whether the particular coal intestate was moving would be used in interstate or intrastate engines. It being a concrete and separable commodity, unlike water, all the coal that intestate was working upon at the time might eventually be used entirely for intrastate traffic.

Then, again, the future use was remote, which was sufficient in itself to lend a degree of uncertainty to the future uses. At least, that must be the consideration which the court has given to remoteness. The court said:

"Manifestly, there was no such close or direct relation to interstate transportation in

the taking of the coal to the coal chutes. This was nothing more than the putting of the coal supply in a convenient place from which it could be taken as required for use."

This language does not apply at all to the thing Collins was doing in the case at bar while he was starting the engine to pump water into the tank for immediate use by waiting interstate engines.

But the chief distinction we desire to point out between the Harrington case and the case at bar at this point is that the intestate in the Harrington case was not engaged in a general interstate employment. His duty in relation to interstate commerce was controlled entirely by the interstate quality of the thing he was working on for the time being. He was engaged at one moment in an interstate function, and the next, perhaps, in an intrastate function. He was not a regular attachee in his duties to a permanent stationary instrumentality of commerce. His duties were not confined to such instrumentality, or such instrumentalities used for both kinds of commerce.

In the case at bar it is entirely different. Collins was engaged exclusively in the management and operation of these permanent instrumentalities of interstate commerce, or rather, both kinds of commerce, which is sufficient, including

the gasoline engine he was working on at the time of his injury.

In the Kelly case (238 Fed. 95) cited by counsel, the employee was not at the time he was injured engaged on the coal chutes or roundhouse but was walking from the tower where he had been toward the place where other employees were so employed. He was walking in the middle of the track or close alongside it and was run over by a train. The decision was founded on the Harrington case and has no application here. If so it is not good law. Certainly it is no authority that one employed generally and permanently in caring for and working upon a permanent instrumentality of interstate commerce is not within the act. Or where either the general employment, as distinguished from the particular act the employee was doing at the time, was interstate, or where the work is upon a permanent instrumentality of both kinds of commerce.

We do not think that cases arising under State Workmen's Compensation Acts, wherein the employer is seeking to bring the employee without such Act and within the Federal Act present fair tests.

The natural tendency of courts in such cases is to bring the employee within the Workmen's Compensation Act if possible and to do so it is necessary to exclude the federal act.

The *Gallagher* case (180 N. Y. A. D., 88;
222 N. Y., 640; 248 U. S., 559) and
Vollmers case (180 A. D., 60; 223 N. Y.,
571)

are by no means authorities against us.

The Court of Appeals of the State of New York has no jurisdiction to review the facts in a case. The only question with reference to the facts that that court has jurisdiction to determine is the question of law whether there is any evidence whatever to support the determination of the facts by the courts below, and it has not jurisdiction to determine even that question of law when the Appellate Division, the Court next below, is unanimous.

Our Court of Appeals has evidently established the rule in these Workmen's Compensation cases that when the question as to whether the employee was engaged in interstate commerce is determined by the court below as a question of fact, it will not disturb such determination.

This is shown by the decision in the
Matter of Plass, 226 N. Y., 449,

the court there saying:

"We cannot pass upon the weight of evidence and say whether, in our opinion, this question of fact was rightly decided. In order to present the question, we have taken the evidence most favorable to the respondent which the Commission might have believed."

Therefore, in the *Gallagher* case, for instance, (222 N. Y., 649) it was recited in the decision (without opinion),

"The Commission found as a fact that Gearrity (the employee) was not engaged in interstate commerce."

The same course was followed in the *Vollmers* case (223 N. Y., 571) for, the Industrial Commission had determined the facts and the Court of Appeals followed the results of such determination.

Without doubt, this court in the *Gallagher* case (248 U. S., 559) followed the same rule adopted by the New York Court of Appeals and denied application for a Writ of Certiorari.

In the *Gallagher* case, however, it will be found by examining the decision at the Appellate Division (180 A. D., 88) that the employee was a general employee, not engaged like Collins exclusively in the operation of interstate instrumentalities. He was a carpenter. The case turned on the question as to the character of his work at the precise time of the accident, which involves only the narrower phase of the case at bar heretofore pointed out. He was repairing coal pockets which were from time to time used to supply locomotives in both kinds of commerce. The pockets were not then in use at all. They were simply being repaired. As heretofore observed, the question of re-

moteness, directness, immediate effect upon, connection with or relation to the interstate commerce being carried on by the railroad company often becomes material in determining the question.

There was no direct effect, no immediate connection, no close relation of what Gallagher was doing with interstate commerce. It was somewhat like a miner mining coal which might be shipped or used in interstate commerce and might not, where it is shown that coal from that mine is used in both kinds of commerce, as in the *Yourkonis* case (238 U. S., 439) or the *Harrington* case (243 U. S., 177), and the *Barlow* case (244 U. S., 183).

These same arguments apply to the *Vollmers* case, as will be noted by examining the decision at the Appellate Division (180 N. Y., A. D., 60).

POINT II.

There was no reversible error in the charge of the court on the question of damages.

Counsel for plaintiff in error urges that it was error to charge the jury that they could consider Collins' shame and humiliation caused by his disfigurement.

In the body of the charge the court instructed the jury as follows:

“You may take into consideration all the pain of body and mind he has suffered as a direct result of the injuries he received * * * to the present time; * * * all the pain and suffering, if any, he will endure in the future which directly grows out of his complaint of injuries. * * * The pain and suffering and the loss of earning power for the future must be found by you with reasonable certainty. (Fols. 788-790 Record). * * * You will not award him punitive damages, *i. e.*, damages by way of punishment. (792) You will leave both sympathy and sentiment, both prejudice and bias behind you when you enter your room for deliberation.” (794).

As stated by Judge Rogers at the Circuit Court of Appeals in his opinion, discussing the charge complained of as to disfigurement, shame, and humiliation:

“The Court having already charged that the jury might take into consideration all the pain of body and mind the plaintiff had suffered as a direct result of the injuries he received * * * the instruction as asked was entirely unnecessary.” (Page 243-244-Record).

In

Seaboard Airline Railway v. Renn, 241
U. S., 290; 36 S. C. R. 567,

this court said with reference to such an alleged error as is claimed here, if the charge in the case at bar should be considered to be inaccurate.

"The inaccuracies were not grave, and the charge as a whole was calculated to give the jury a fair understanding of the subject."

However, the charge complained of was not error, but was entirely in accordance with the rulings of this court.

It is undisputed that defendant in error was terribly scarred and disfigured on his face, neck and ears. These burns were of the third degree, resulting in scar tissue which is red and hideous in its appearance and will continue so during his life. It extends from the top of the right ear along the right side of the face under the chin and up on the left side of the face and the top of the left ear, and the outer lobes of one of the ears were entirely burned off. The outer skin of the face, neck, chin and ears was badly burned in this way and the scar tissue was crusted and hard, the hair follicles being destroyed.

Defendant in error was exhibited to the jury and their opportunity for seeing and appreciating his appearance and disfigurement was much better than that of this court, and their judgment on the question is entitled to respect.

The question of excessiveness of the verdict is not for this court.

So we have here only the question as to whether it was error to permit the jury to consider mental pain and anguish arising from the appearance of defendant in error by reason of this scarred and disfigured condition, caused by his injuries, and which he could not hide and which will always be present and visible wherever he is and whatever doing. He testified that when he went about among people they always noticed this affliction and it was very embarrassing to him (228, 229) and that he suffered mental anguish and humiliation by reason thereof, (Fol. 230) that

“it is very humiliating to be out in company or any place and people noticing you and making you feel kind of embarrassed, watching you all the time.”

He was a single man (Fol. 233) twenty-one years old. (Fol. 233).

At the end of the charge proper the court was requested to and did instruct the jury that defendant in error was entitled to damages

“—if he is entitled to damages—for the disfigurement and physical impairment if they should find that same exists,” (Fol. 801) and pursuant to request “any disfigurement which causes plaintiff shame and humiliation,” (Fol. 803).

There was some question after the trial whether it was the word “shame” or the word “pain” that

counsel for defendant in error used, but Judge Thomas assumed that the word shame was used and denied the motion for a new trial on that assumption.

The words shame and humiliation, however, were used in a cognate sense, the latter qualifying the former. They were used in connection with the words "disfigurement" (Fols. 801, 803), "mental anguish," "humiliation," and "embarrassment" *caused by the disfigurement* (Fols. 230, 233), used during the trial.

Of course, it was well understood that the word shame was not used in the sense of expressing a feeling which might arise from troubled consciousness of moral dereliction—from anything the person himself had done which would cause him to feel shame. It must be assumed that the jury had average intelligence and that they understood that the word shame was qualified by the words "humiliation" and "mental anguish" and "embarrassment" and that they were only to consider it as meaning humiliation and mental anguish—mental pain—arising from the disfigured appearance.

It is well established by the authorities that one is entitled to recover damages for mental anguish or humiliation caused by the wrong of another. This is mental pain. No one can be permitted to wrongfully cause another to appear dehumanized

almost, or so disfigured and repulsive as to cause others to shrink from him or be curious or even sympathetic toward him, or perhaps ridicule him, and then claim irresponsibility for mental pain and suffering arising from resulting mental anguish and humiliation. It is instinctive in the human to desire to present a normally perfect physical body to his associates and to the world. Even the lower animals are very apparently distressed and oppressed by the mere appearance of a disfigured body. To a young man twenty-one years old, of intelligence and education, a normally perfect physique is not only a satisfaction but a valuable asset. The contrary of this, certainly when he appears terribly and revoltingly disfigured, is not only distressing to his sensibilities but an inestimable loss to him. It repels others, and destroys pride, buoyancy, and poise in himself. The success of such a young man depends in a large measure upon his appearance and address, and headway in his social and business contact with others. Especially is it valuable that he should present a normal physique in seeking a matrimonial mate. Such injuries as Collins received will tend to destroy his prospects of social and business success, and an advantageous matrimonial alliance. Certainly all this, and his mere appearance at all times in the sight of others, may well cause him mental anguish and humiliation. It was proved that it actually does cause him such mental pain. (Fols. 228, 230).

In the cases of

*New York Central R. Co. v. Bianc and
American Knife Co. v. Sweeting-Clark
Knitting Co.*, 40 S. C. R. 44,

this court decided that a statute of the State of New York, authorizing the Industrial Commission to award compensation to employees, in its discretion, in case of an injury resulting in serious facial or head disfigurement, was constitutional.

Justice Pitney, in his opinion, treated such facial or head disfigurement as proper elements of damage generally, not only by reason of the repulsive or offensive appearance thus caused, but by reason of impairment of earning power, and, of course, the latter consideration was the thing most important under a Workman's Compensation Act, which theoretically aims only to compensate for loss of earning power.

The view of the court, however, of such disfigurement, was expressed and is pertinent here. The court said:

“Even with impairment of earning power the sole justification for imposing compulsory payment of workmen's compensation upon the employees in such cases, it would be sufficient answer to the present contention to say that a serious disfigurement of the face or head reasonably may be regarded as having a direct relation to the injured person's earn-

ing power irrespective of its effect upon his mere capacity for work. Under ordinary conditions of life, a serious and unnatural disfigurement of the face or head very probably may have a harmful effect upon the ability of the injured person to obtain or retain employment. Laying aside exceptional cases, which we must assume will be fairly dealt with in the proper and equitable administration of act, such a disfigurement may render one repulsive or offensive to the sight, displeasing, or, at least, less pleasing to employer or fellow employees and to patrons or customers. See (*Ball v Wm. Hunt & Sons, Ltd.* (1912) App. Cas. 496).

But we cannot concede that impairment of earning power is the sole ground upon which compulsory compensation to injured workmen legitimately may be based."

The disfigurement of Collins, causing mental anguish in the way of shame, as the term was used and understood, and humiliation, probably, if not necessarily, will impair Collins' future earning capacity. That, we understand, is the import of the decisions of this court.

Therefore, the charge was proper.

There is no room for the contention that this disfigurement is not a direct result of the injury and the negligence of plaintiff in error. It is not

necessary that it should be the direct result in the same sense that physical pain caused by the injury itself, or by the scar tissue coming in contact with the cold, are, as shown here. It is enough that the anguish and humiliation is a state of mental pain caused by the wrong or negligence of the railroad company.

It was, of course, evident to everybody and well understood by the jury that when counsel for defendant in error was requesting an instruction which would cover the case in this respect, and used the language "that in addition to the earning capacity and in addition to the pain and suffering" (Fol. 801), he was expressing and emphasizing the distinction which exists between *physical* pain and suffering and *mental* pain and suffering—that was all.

Plaintiff in error cites the old case of *Southern Pacific v. Hetzer* (135 Fed. 272) and quotes at length from the opinion written in that case. That was a case of an injured leg. It presented no such cause for mental anguish and humiliation, arising directly from the wrong of the railroad company, as is present in the case at bar. But even at that early time it was recognized in that case that there was then conflict in the authorities on the subject. That conflict of authority is now settled in favor of our contention, and the *Hetzer* case has been overwhelmingly overruled by higher authority and discarded by equal.

In *McDermott v. Severe* (202 U. S. 600, 26 Sup. Ct. Rep. 709), the question arose and the Supreme Court of the United States said:

"Furthermore, an objection is taken to the charge as to mental suffering, past and future. It is objected that this instruction permits a recovery for future humiliation and embarrassment of mind and feelings because of the loss of the leg. But we find no objection to the charge as given in this respect. *

* * * An instruction of this character was sustained in *Washington & G. R. Co. v. Harmon*, 147 U. S., 584, 37 L. Ed. 289, 13 Sup. Ct. Rep. 557. That there might be more or less continuous mental suffering directly resulting from a maiming of the plaintiff's person in an injury of this character was probable, and where the jury was limited to that which necessarily resulted from the injury, we think there can be no valid objection or just ground of complaint. Of a charge of this character, in *Kennon v. Gilmer*, 131 U. S., 22, 33 L. Ed. 110, 112, 9 Sup. Ct. Rep. 696, Mr. Justice Gray speaking for this court, said:

* * * * * The action is for an injury to the person of an intelligent being, and when the injury, whether caused by wilfulness or by negligence, produces mental as well as bodily anguish and suffering, independently of any extraneous consideration or cause, it is impossible to exclude the mental suffering in estimating the extent of the personal injury

for which compensation is to be awarded. The instruction was in accord with the opinions of this court in similar cases' "

That this McDermott case overrules the doctrine enunciated in the Hetzler case has been well recognized since by the courts.

In *U. S. Express Co. v. Wahl*, (168 Fed. 848) the court said (Fol. 851):

"The remaining error alleged was in so much of the charge on the subject of damages as permitted the jury to consider 'humiliation resulting from the disfigurement from the loss of the eye.' This was duly excepted to. There is a contrariety in the decisions as to whether recovery can be had for such mental suffering arising as the consequence of a personal injury. A leading case holding that no recovery can be had therefore is the case of *Southern Railway Company v. Hetzler*, 135 Fed. 272, 68 C. C. A. 26, 1 L. R. A. (N. S.) 288. We think the matter is settled for us by the recent decision of the Supreme Court in the case of *McDermott v. Severe*, 202 U. S., 600, 610, 26 Sup. Ct. 709, 50 L. Ed. 1162. The injury complained of in that case was the loss by a boy under seven years of age, of one of his legs below the knee. The Trial Court had instructed the jury that they might find a verdict 'for the mental suffering, past and fu-

ture, which the jury may find to be the natural and necessary consequence of the loss of his leg.' It was held that the instruction was not erroneous. Mr. Justice Day said: 'Furthermore, an objection is taken to the charge as to mental suffering, past and future. It is objected that this instruction permits a recovery for future humiliation and embarrassment of mind and feelings because of the loss of the leg. But we find no objection to the charge as given in this respect. The court said: The jury are to consider mental suffering, past and future, found to be the necessary consequence of the loss of his leg. * * * Where such mental suffering is a direct and necessary consequence of the physical injury, we think the jury may consider it. It is not unlikely that the court might have given more ample instruction in this respect had it been requested so to do. But what was said limited the compensation to the direct consequences of the physical injury.'

In the *Middlesex & B. St. Ry. Co. v. Eagen* (214 Fed. 747), the court, at page 751, said:

"The evidence as to pain, anguish and solicitude occasioned Sweeney by the injury to his leg including apprehension of his inability to labor due to its probable loss, was competent. *His mental distress as to the effect of the accident upon his person*, was proximately caused by the alleged negligence of the

defendant, and was a natural result, reasonably to be apprehended under the circumstances."

Citing a leading case (*Prescott v. Robinson*, 74 N. H., 460).

This case also answers the contention of our opponent that the mental anguish and humiliation of Collins was not the result of the negligence of plaintiff in error.

We call attention to the language used by the court in *Morris v. Int. Ry. Co.* (174 App. Div. 61) because it well expresses and illustrates the importance of this element of damage. The court in that case said:

"She has lost for all time not only the enjoyment, but the mental improvement to be derived from free association and companionship. She must sit her days out, conscious that such association as she receives from others has its foundation solely in sympathy. She can only receive, she cannot give. She is doomed to exile. She can have no hope of future improvement, and the only relief from the desolation of her loneliness will lie in her death. These considerations furnish a basis for mental anguish and suffering incapable of adequate compensation."

That the court deemed this to be a proper subject for damages separate and distinct from the

physical pain and suffering is shown from the sentence following that above quoted:

"It is also directly proven that she has heretofore undergone and must hereafter suffer intense physical pain."

Valuable annotations are found in the note to *Diamond Rubber Co. v. Harryman* (15 L. R. A. N. S., 175), at page 777, where the annotator reaches the conclusion that the weight of authority throughout the United States is that mental suffering distinct from physical pain but arising from physical injury is a proper subject for the allowance of damages.

The Court of Appeals of the State of New York in a recent case have reached substantially the same conclusion in *Darcy v. Presbyterian Hospital* (202 N. Y., 259), citing the language in *Larson v. Chase* (47 Minn. 307), a leading case on the subject, saying:

"The rule adopted in the Minnesota case fully meets our approval, consequently plaintiff being the mother and the nearest surviving next of kin to the decedent is entitled to maintain the action and to recover damages for her wounded feelings and mental distress."

See also the following cases: *Rockwell v. Eldred* (7 Pa. Sup. Ct. 95); *Gray v. Washington*

Water Power Co. (71 Pac. Rep. 206); Hedell v. Chicago, etc., R. R. Co. (46 N. W. 115); Central R. R., etc., v. Lamer (10 S. E. 279); Kenno v. Gilmer (131 U. S., 22).

POINT III.

This judgment should be affirmed.

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